(27,031)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 335.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, AND ROBERT M. THOMPSON, APPELLANTS,

vs.

W. GORDON McCABE, JR., AND WILLIAM F. GRAY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

STEPHEN H. P. PELL and Others, Plaintiffs-Appellants,

against

W. GORDON MCCABE, JR., and Another, Defendants-Appellees.

TRANSCRIPT OF RECORD.

On Appeal from the District Court of the United States for the Southern District of New York.

Myers & Goldsmith, Attorneys for Plaintiffs-Appellants, No. 100 Broadway, Manhattan, N. Y. City.
W. St. John Tozer, Attorney for Defendants-Appellees, No. 42 Broadway, Manhattan, N. Y. City

United States Circuit Court of Appeals, Second Circuit. Filed Nov. 12, 1918. William Parkin, Clerk.

1 *Citation on Appeal.*

By the Honorable Learned Hand, one of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit, to W. Gordon McCabe, Jr., and William F. Gray, Greeting:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Second Circuit to be held at the Court Rooms thereof, in the Federal Building, in the Borough of Manhattan, in The City of New York, in the District and Circuit above named, on the 21st day of November, 1918, pursuant to the appeal and order allowing the same, filed in the office of the Clerk of the United States District Court for the Southern District of New York on the 24th day of October, 1918, wherein Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson are appellants and you are appellees, to show cause, if any there be, why the decree in said appeal mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in The City of New York in the District and Circuit above named this 24th day of October, 1918, and of the Independence of the United States the 143rd.

LEARNED HAND,
Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

2 *Notice of Appeal.*

District Court of the United States for the Southern District of New York.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

SIRS:

You will please take notice that the plaintiffs hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the decree of the United States District Court for the Southern District of New York, dated the 23rd day of October, 1918, made by Hon. Learned Hand, United States District Judge, dismissing the complaint herein, and from each and every part of the said decree.

Dated, New York, October 24, 1918.

Yours, &c.,

MYERS & GOLDSMITH,
Attorneys for Plaintiffs,
100 *Broadway, Manhattan, City of New York.*

To W. St. John Tozer, Esq., Attorney for Defendants; the Clerk of the United States District Court for the Southern District of New York.

(Endorsed: U. S. District Court. Filed Oct. 24, 1918. S. D. of N. Y.)

3 *Subpœna.*

The President of the United States of America to W. Gordon McCabe, Jr., and William F. Gray, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two hundred and fifty dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 18th day of September, in the year one thou-

sand nine hundred and eighteen and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR.,
Clerk.

MYERS & GOLDSMITH,
Plaintiffs' Sol'rs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court on or before the twentieth day after service hereof, excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

4 *Bill of Complaint.*

District Court of the United States for the Southern District of New York.

E 15—222. In Equity.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

Complaint.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The plaintiffs above named, by Myers & Goldsmith, their attorneys, complaining of the defendants above named, allege, upon information and belief:

1. The plaintiff, Stephen H. P. Pell, resides at Ticonderoga, in the County of Essex, State of New York.

The plaintiff, Charles A. Kittle, resides at No. 1138 Dean Street, Borough of Brooklyn, City of New York and State of New York.

The plaintiff, Howland H. Pell, resides at the City of New York, in the County of New York and State of New York.

5 The plaintiff, Robert M. Thompson, resides at Southampton, in the County of Suffolk, State of New York.

The plaintiffs prior to July 31, 1914, composed the firm of S. H. P. Pell & Co., a limited partnership formed and organized under the laws of the State of New York, and of which firm Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid were general partners, and Robert M. Thompson aforesaid was the special or limited partner of said firm of S. H. P. Pell & Co.

2. Upon information and belief, that the defendant, William F. Gray, resides in the City of Charleston, State of South Carolina, and in the Eastern District of South Carolina.

Upon information and belief, that the defendant, W. Gordon McCabe, Jr., resides in the City of Charleston, State of South Carolina, and in the Eastern District of South Carolina.

That said defendants are engaged in business as cotton brokers and are members of the New York Cotton Exchange, under the firm name and style of W. Gordon McCabe & Co., and transact business at No. 60 Beaver Street, in the City of New York, within the Southern District of New York.

3. That at divers times prior to about December 23, 1913, the defendants employed S. H. P. Pell & Co., as brokers and members of the New York Cotton Exchange, to purchase certain quantities of cotton for future delivery on the New York Cotton Exchange, and said S. H. P. Pell & Co. made such purchases pursuant to such employment, and thereafter and on or about the 22nd and 23rd days of December, 1913, pursuant to the defendants' directions, S. H.
6 P. Pell & Co. sold said cotton so purchased and the difference between the amounts paid in the purchases and commission therefor and the amount realized upon the sale thereof was the sum of $114,457.67 which the said defendants promised and agreed to pay.

4. That on or about the 23rd day of December, 1913, S. H. P. Pell & Co. rendered to the said defendants an account of the said dealings and transactions between the said defendants, S. H. P. Pell & Co., stating the amount of $114,457.67 as the balance due and owing from the said defendants to the said firm of S. H. P. Pell & Co. and said defendants accepted and retained said account without making any objection thereto, and thereafter the defendants paid the sum of $22,691.53 on account of said indebtedness, leaving due and owing to said S. H. P. Pell & Co. on January 15, 1914, a balance of $91,566.14.

5. That on the 3rd day of August, 1914, pursuant to the Acts of Congress of the United States providing for bankruptcy proceedings, a certain petition in due form by creditors having provable claims, praying for the involuntary adjudication of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as partners doing business under the firm name of S. H. P. Pell & Co., was duly presented to the District Court of the United States for the Southern District of New York, having jurisdiction thereof, and on said date said petition was duly filed in the office of the Clerk of the District Court of the United States for the Southern District of New York.

6. That a certain petition praying for the appointment of receivers in bankruptcy of Stephen H. P. Pell, Charles A. Kittle
7 and Howland H. Pell, individually and as partners doing business under the firm name of S. H. P. Pell & Co., bankrupts, was also duly presented to said United States District Court in bankruptcy, having jurisdiction thereof, on the 3rd day of August, 1914, and thereupon an order was duly entered in the said United States District Court for the Southern District of New York in said bankruptcy proceedings appointing Theodore H. Price, Arthur R. Marsh and Joseph M. Hatfield as receivers of the said firm of S. H. P. Pell & Co., and of the individual members thereof, said alleged bank-

rupts, and that said receivers duly qualified and entered upon the performance and discharge of the duties of their office as such receivers.

7. That said receivers entered upon the discharge of the duties of their office as aforesaid and in the performance thereof took possession of a large amount of securities and stocks, which were the property of the plaintiff, Robert M. Thompson, and in which property it was alleged that the said receivers and the bankrupt estate had no interest therein and had no claim or title thereto.

8. That on the 23rd day of November, 1914, a petition made by Logan and Bryan, and thereafter and on or about the 28th day of November, 1914, a petition made by Nathaniel H. Morrison and others, creditors of and having provable claims against the firm of S. H. P. Pell & Co., were duly presented to the United States District Court for the Southern District of New York, having jurisdiction thereof, in the said bankruptcy proceeding against the said S. H. P. Pell & Co., aforesaid, and the individuals aforesaid, to wit:
8 Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, alleging that the said Robert M. Thompson (one of the plaintiffs herein), was a member of and a general partner in the firm of S. H. P. Pell & Co., and liable for the payment of the debts of said firm of S. H. P. Pell & Co., and prayed and demanded that the said Robert M. Thompson be made a party defendant to the said bankruptcy proceeding; that the firm of S. H. P. Pell & Co. be adjudged to be composed of Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson as general partners and adjudicated involuntary bankrupts, and that the Clerk of the Court be directed to issue a subpœna directed to the said Robert M. Thompson as one of the alleged bankrupts in the proceeding, and that such other and further proceedings should be had as should be proper to have the said Robert M. Thompson adjudicated an involuntary bankrupt individually and as a general partner and a member of the said firm of said S. H. P. Pell & Co.

That copies of the said petitions and of the said subpœna and the papers upon which it issued are hereunto annexed and made a part hereof and are marked respectively Exhibits 1, 2 and 3.

9. Upon information and belief that the receivers aforesaid in the course of their administration of the estate of S. H. P. Pell & Co., in bankruptcy, acting for and in behalf of the bankrupt estate, on or about the 19th day of October, 1914, gave notice to the defendants that the firm of S. H. P. Pell & Co. was in bankruptcy and of their appointment as receivers, and as such receivers demanded payment of a claim due from said defendants to the bankrupt estate amounting to the sum of $261.52, and also on or about the 19th day
9 of October, 1914, demanded payment of a claim due from the said defendants, to the bankrupt estate, amounting to the sum of $91,467.57, and which latter claim is the same cause of action mentioned in paragraphs 3 and 4 of this complaint and said defendants kept and retained said statements without making objection thereto, and on or about the 21st day of November, 1914, the said defendants paid the aforesaid sum of $261.52 to the said receivers.

10. Plaintiffs further allege upon information and belief that the defendants above named had full and complete knowledge and notice of the maintenance and disposition of the said bankruptcy proceedings and the orders and decrees therein made, from about the time of the inception thereof down to and including the final disposition thereof.

11. That thereafter and on the 25th day of November, 1914, an order of adjudication was duly made by the said United States District Court and entered in the said bankruptcy proceedings against the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, bankrupts, individually and as members of the firm of S. H. P. Pell & Co., adjudicating said firm of S. H. P. Pell & Co. and said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individual members of said firm, to be involuntary bankrupts.

A copy of said order of adjudication is hereunto annexed and made a part hereof and is marked Exhibit 4.

12. That divers and various negotiations were had between the creditors of said firm of S. H. P. Pell & Co., bankrupts aforesaid, the receivers, and the said Robert M. Thompson for an adjust-
10 ment and settlement of the claims of the creditors of said firm of S. H. P. Pell & Co., and for a composition in bankruptcy and for the dismissal of the said several petitions against the said Robert M. Thompson, the withdrawal of the claim for $3,373,082.30 made in said bankruptcy proceedings against said S. H. P. Pell & Co. by said Robert M. Thompson, and the return of certain securities to and the release and discharge of the said Robert M. Thompson and of the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as copartners of the said firm of S. H. P. Pell & Co., and from all liability to the creditors.

13. That on or about the 2nd day of October, 1914, the said bankrupts duly filed their schedules in said bankruptcy proceedings, and therein set forth that the said bankrupts individually and the firm of S. H. P. Pell & Co. were indebted to the said Robert M. Thompson in the sum of $3,373,082.30, and in said schedules further set forth that the defendants were indebted to the said firm of S. H. P. Pell & Co. in the sum of $261.52.

A copy of the statement of said claim of said Robert M. Thompson as stated in said schedules is hereto annexed and made a part hereof and is marked Exhibit 5.

That in pursuance of said negotiations and agreement the said bankrupts, to wit, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, and said firm of S. H. P. Pell & Co. on or about the 21st day of December, 1914, pursuant to the provisions of the Bankruptcy Act in such case made and provided, duly proposed and submitted an offer of composition to their creditors, including the creditors of said firm of S. H. P. Pell & Co.

A copy of the said offer of composition is hereto annexed and made a part hereof and is marked Exhibit 6.

11 14. That in pursuance of said negotiations and agreement of settlement and composition aforesaid, the said receivers made and duly presented to the said United States District Court

their certain petition dated January 6, 1915, together with certain other papers, and an order was thereupon duly made by the said United States District Court in the said bankruptcy proceeding on the 6th day of January, 1915.

That copies of said petition and papers presented therewith and order are hereunto annexed and made a part hereof and are marked respectively Exhibits 7 and 8.

15. That thereafter the said plaintiff, Robert M. Thompson, duly carried out and performed all the terms and conditions of the agreement and understanding referred to in the said order of January 6, 1915, and the petition upon which it was granted (Exhibits 7 and 8).

16. That thereafter such further proceedings in the said matter of S. H. P. Pell & Co. in bankruptcy aforesaid, were duly had in the said United States District Court for the Southern District of New York that on the 25th day of January, 1915, an order confirming the terms of the said offer of composition was duly made and entered in the said United States District Court for the Southern District of New York.

A copy of said order of confirmation is hereunto annexed and made a part hereof and is marked Exhibit 9.

17. That on the 25th day of January, 1915, John W. Jay named in the said offer of composition (Exhibit 6) and the order of confirmation (Exhibit 9), accepted the terms of the agreement
12 and entered upon the performance of the trust thereby created and continued to discharge the same until April 13, 1915.

18. That thereafter and on the 5th day of February, 1915, the said receivers, pursuant to the provisions of the said order of confirmation and in performance of the offer of composition, and after the acceptance of the said trust by the said John W. Jay as trustee aforesaid, duly made and executed under their hands and seals their deed or instrument of transfer as receivers aforesaid, wherein and whereby it was, among other things, provided that the said receivers "do by these presents convey and assign unto said John W. Jay all of the assets and property of said S. H. P. Pell & Company and of said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as co-partners doing business under the firm name and style of S. H. P. Pell & Company. * * *

"To have and to hold the same unto said John W. Jay, his heirs and assigns forever."

19. That thereafter and on the 6th day of March, 1915, pursuant to said offer of composition and order of confirmation, made and entered as aforesaid, and in the due performance thereof, the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually and as partners, doing business under the firm name of S. H. P. Pell & Co., bankrupts, duly executed their deed or other instrument of transfer under their hands and seals, wherein and whereby they duly conveyed to the said John W. Jay "all of the assets and property of said S. H. P. Pell & Company and of said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell,
13 individually and as co-partners doing business under the firm name and style of S. H. P. Pell & Company."

20. That the said offer of composition as confirmed and the order of confirmation entered aforesaid was duly and fully completed, performed and carried out by the said bankrupts and by the said Robert M. Thompson.

21. Upon information and belief that by virtue of the provisions of said order of confirmation of January 25, 1915 (Exhibit 9), and of the said Bankruptcy Act and the several amendments thereto in force on the 25th day of January, 1915, and in force and effect on the 12th day of March 1915, and of the final acts in full performance of the terms of the said composition which were duly and completely carried out and performed by the bankrupts, that the bankruptcy proceedings then terminated, and the said bankrupts and the said Robert M. Thompson were released and discharged from all liability for the debts of and all provable claims against the firm of S. H. P. Pell & Co. and the creditors of said S. H. P. Pell & Co. were forever barred by the provisions of the offer of composition (Exhibit 6) and the order of confirmation aforesaid (Exhibit 9), and of the Bankruptcy Act aforesaid, and the said firm of S. H. P. Pell & Co. and said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, general partners thereof, and Robert M. Thompson, as special partner aforesaid or otherwise, were as partners and individually released and discharged from any further liability to the creditors of the said firm, including the defendants, who thereupon ceased to have any further claim, demand or cause of action against the said firm of S. H. P. Pell & Co. and the individual members aforesaid and said Robert M. Thompson, of, from and upon all claims provable in bankruptcy.

14 22. Upon information and belief, that on the 13th day of April, 1915, the said John W. Jay duly resigned the trust aforesaid and thereupon the Guaranty Trust Company of New York was duly appointed substituted trustee in the place and stead of the said John W. Jay, and the said Guaranty Trust Company of New York accepted said trust and entered upon and now continues in the performance of the said trust, and thereafter and on the 13th day of April, 1915, the said John W. Jay, as such trustee, duly executed his deed or other instrument of conveyance as trustee, conveying and transferring to the Guaranty Trust Company of New York, which accepted the said trust, all of the remaining estate of the bankrupts individually and as co-partners, which transfer included, among other things, the following claims, demands and causes of action:

1. A claim, demand and cause of action in favor of S. H. P. Pell & Co., and against the defendants, W. Gordon McCabe, Jr., and William F. Gray, as co-partners, and being the cause of action set forth in paragraphs 3 and 4 of this complaint.

2. A claim, demand and cause of action in favor of and belonging to W. R. Craig & Co. against the defendants, W. Gordon McCabe, Jr., and William F. Gray, as co-partners, for the sum of $10,868.00, which was by the said W. R. Craig & Co. assigned and transferred to S. H. P. Pell & Co. on or about February 3, 1914.

3. A claim, demand and cause of action in favor of and belonging to E. & C. Randolph against the defendants, W. Gordon McCabe, Jr.,

and William F. Gray, as co-partners, for the sum of $30,894.02, which was by the said E. & C. Randolph assigned and transferred to S. H. P. Pell & Co. on or about February 3, 1914.

That on or about the 13th day of April, 1915, Stephen H. P. Pell, Charles A. Kittle and Robert M. Thompson of the plaintiffs herein purchased and acquired the interests of the several creditors of S. H. P. Pell & Co. aggregating the sum of $2,249,174.20, mentioned in Schedule "C" of said Exhibit 6 herein, and are now the owners and holders of said interests.

23. That on or about the 14th day of June, 1916, an action was brought in the Supreme Court of the State of New York, laying the venue in New York County, by the Guaranty Trust Company of New York as substituted trustee aforesaid, as plaintiff, against W. Gordon McCabe, Jr., and William F. Gray as defendants therein, and being the defendants in this action, to recover the aforesaid sum of $91,566.14 (among other claims), and which action was thereafter removed by the defendants to the United States District Court for the Southern District of New York, and was thereafter by the Federal Court duly remanded to the State Court, wherein the said action is now pending.

That the said defendants in their answer in said action last mentioned interposed and served on or about the 3rd day of January, 1917, among other things, for a defense set up and alleged in respect to the cause of action set forth in paragraphs 3 and 4 of this complaint, the following defensive matter, viz.:

"That at various times prior to the first day of January, 1914, the defendants had employed S. H. P. Pell & Co. as brokers to purchase certain quantities of cotton for future delivery on the New York Cotton Exchange; that during said period said S. H. P. Pell & Co. rendered to defendants various statements of account wherein
16 said defendants were charged with the purchase price of about 77,700 bales of cotton in the amount of approximately $15,174,825, which cotton according to said statements of account had been purchased by S. H. P. Pell & Co. for defendants and the purchase price whereof as aforesaid had according to said statements of account been paid, laid out and expended by said S. H. P. Pell & Co.; that defendants relied on said statements and until some time after the commencement of this action supposed them to be true and correct.

"Relying on the truth and correctness of said statements as aforesaid, defendants had prior to the first day of January, 1914, paid to said S. H. P. Pell & Co. large sums of money, aggregating several hundred thousand dollars, and had subsequently but prior to said January 1, 1914, received a statement of account from said S. H. P. Pell & Co. showing a balance due to said S. H. P. Pell & Co. on account of said alleged purchases (and after allowing for said payments made by defendants) in the sum of $114,457.67.

"On information and belief that large amounts of said alleged purchases of cotton were not in truth or in fact made by said S. H. P. Pell & Co., and the sums of money charged in said statements of account representing the said alleged purchases as aforesaid were not

in truth or in fact paid, laid out or expended by said S. H. P. Pell & Co., that all the facts in this paragraph alleged were at all times within the knowledge of said S. H. P. Pell & Co., but were not within the knowledge of the defendants or either of them until after the commencement of this action.

"On information and belief that the amounts erroneously charged the defendants in said statements of account rendered by said
17 S. H. P. Pell & Co., as aforesaid, greatly exceeded the sum of $115,000, so that a proper, just and true account and statement of account between the defendants and said S. H. P. Pell & Co. had immediately prior to the first day of January, 1914, would have shown that the defendants were not at that time in any way indebted to said S. H. P. Pell & Co., but on the contrary would have shown that said S. H. P. Pell & Co. were at that time largely indebted to defendants.

"That said statements of account so rendered by S. H. P. Pell & Co. are statements and accounts mentioned in the complaint herein and related to and included accounts of the alleged transactions and payments alleged in said complaint to have been made by S. H. P. Pell & Co., for account of defendants."

24. That on or about the 29th day of March, 1917, another and further action was brought in the Supreme Court of the State of New York, laying the venue in New York County, by the Guaranty Trust Company of New York, as substituted trustee aforesaid, as plaintiff, against W. Gordon McCabe, Jr., and William F. Gray, as defendants, therein (and being the defendants herein), upon the said two causes of action which originally accrued in favor of W. R. Craig & Co. and E. & C. Randolph, for the aggregate sum of $41,762.02, and which action was thereafter removed by the defendants therein to the United States District Court for the Southern District of New York, but was thereafter by the Federal Court duly remanded to the State Court, wherein the said action is now pending.

That the said defendants in their answer interposed on or about the 4th day of October, 1917, in the last mentioned action brought by the Guaranty Trust Company of New York, as plaintiff,
18 as the transferee or assignee of the above mentioned claims of W. R. Craig & Co. and E. & C. Randolph, stated, among other things, an alleged defense and also a counterclaim against the said assigned causes of action arising and growing out of the transactions set forth in paragraphs 3, 4 and 23 of this complaint, viz.:

"For a counterclaim alleges:

"That during the months of November and December, 1913, and January, 1914, defendants paid to S. H. P. Pell & Co. various sums of money aggregating over $390,000; on information and belief that all of said sums were paid by defendants to S. H. P. Pell & Co. for the use of defendants and that no part of said sums or any of them has been repaid to defendants or for their use."

25. Plaintiffs, upon information and belief, further allege that any claim or demand which the defendants had or have against them, or either of them, was provable in the said bankruptcy proceedings, and the defendants falsely and fictitiously pretend and assert that the

said offer of composition (Exhibit 6), and the order of confirmation thereof (Exhibit 9), and of the Bankruptcy Courts (Exhibit 8), and the performance and completion thereof by the plaintiffs as aforesaid, were insufficient in law to release and discharge the alleged indebtedness and claim which the defendants had or claim to have had against the said firm of S. H. P. Pell & Co. and the said individual members, viz., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, and the said Robert M. Thompson, as special partner or otherwise, as aforesaid, arising out of the transactions aforesaid, which the defendants had with the firm of S. H. P. Pell & Co. prior to the 25th day of January, 1915.

19 26. Plaintiffs further allege upon information and belief that the said defendants on or about the 25th day of March, 1918, commenced and instituted an action or suit in the Court of Common Pleas, in the State of South Carolina, County of Charleston, against the plaintiffs, alleging and claiming that the plaintiffs were general partners, constituting the firm of S. H. P. Pell & Co. aforesaid, and therein demand judgment for and seek to recover the sum of $1,500,000, based upon and growing out of the dealings and transactions set forth in paragraphs numbered 3, 4 and 23 of this complaint.

That hereunto annexed and made a part hereof are copies of the summons and complaint in the said action brought by the said defendants, as plaintiffs, W. Gordon McCabe, Jr., and William F. Gray, against the said plaintiffs, as defendants, containing the grounds of the alleged and pretended cause of action, and which are hereby made a part hereof and are marked respectively Exhibits 10 and 11.

Plaintiffs allege upon information and belief that the defendants herein and in the actions referred to in paragraphs 23 and 24 of this complaint had notice and knowledge of all the material facts set forth in the complaint (Exhibit 11) at the time the answers referred to in said paragraphs 23 and 24 were interposed by and on behalf of the defendants in said actions.

27. Plaintiffs further allege, upon information and belief, that the said suit or action in the Court of Common Pleas aforesaid, was instigated, devised, designed and brought, with the intention and design of questioning, challenging and attacking in, by and through the State courts of South Carolina the power and jurisdiction

20 of the United States District Court for the Southern District of New York to entertain the offer of composition (Exhibit 6), to make and enter the said order of confirmation (Exhibit 9), and to make and enter the order of January 6 (Exhibit 8), aforesaid, and the provisions and effect thereof, and with the malicious intention and design of vexing, harassing and annoying the said plaintiffs by and with aforesaid suit and action.

That the purpose of said action so brought and commenced in said Court of Common Pleas brought as aforesaid is to needlessly and uselessly vex, annoy and harass the plaintiffs and to put and subject them to great and unnecessary expense and to require them to attend and defend the action in the State of South Carolina, remote and distant from their several places of occupation and residence and

of the place of residence and occupation of the witnesses who will be necessarily required to testify in said action, at a great and useless waste of time and injury and damage to their business occupation.

28. That the said action so brought by the defendants as plaintiffs therein, in the Court of Common Pleas aforesaid, as said plaintiffs are advised and verily believe, depends upon the same state of facts brought out and proven in the bankruptcy proceedings in part and which as to any other facts connected with and forming part of any transaction of the defendants herein (and plaintiffs therein) with S. H. P. Pell & Co., could have been proven in the bankruptcy proceedings, and any and all questions of fact and law which could be raised and urged in the said Court of Common Pleas could have been raised, urged and maintained in the United States District Court in the aforesaid bankruptcy proceedings.

21 29. That the principal and conclusive question involved in the said action so brought in the Court of Common Pleas, as said plaintiffs are advised and verily believe, is the extent and effect of the offer of composition (Exhibit 6), the order or decree of confirmation, dated January 25, 1915 (Exhibit 9), and the order of January 6 (Exhibit 8) and the operation of the Bankruptcy Act releasing and discharging the plaintiffs of, from and upon any claims provable against and debts of the firm of S. H. P. Pell & Co. due to their creditors, including the defendants, and the alleged liability and debt set forth in the complaint (Exhibit 11) in the said action in the Court of Common Pleas.

That the real and actual purpose and design of said action so brought in said Court of Common Pleas is to assail and attack the validity and sufficiency of the proceedings and orders and decree of the United States District Court for the Southern District of New York in bankruptcy in the matter of S. H. P. Pell & Co., and the power and jurisdiction of that court in the premises.

That thereafter and prior to the commencement of this suit the said Robert M. Thompson, one of the plaintiffs herein, and the only defendant therein who was served with process, entered a special and limited appearance in said State Court and objected to the jurisdiction thereof and duly caused proceedings to be taken and had the said action removed from the State Court, to wit: the Court of Common Pleas, into the District Court of the United States for the Eastern District of South Carolina, wherein the said action is now duly pending for the determination thereof.

The said action pending in the South Carolina Court exposes the plaintiffs to a judgment of a Court other than the Court which
22 rendered said orders and decree, as to their effect and extent, and disturbs the plaintiffs in the possession of their rights, possession and release awarded and secured by the orders and decree (Exhibits 8 and 9), and will by the judgment of the Court in said action expose and subject the plaintiffs to a liability from which they have been released and discharged as aforesaid.

30. That upon information and belief, other persons dealing with said S. H. P. Pell & Co. and who, by reason of similar alleged claims, may have had provable claims against said firm of S. H. P. Pell & Co., and many of whom appeared and proved their claims in said

bankruptcy proceedings, have threatened and intend to bring similar vexatious and harassing suits and actions against the plaintiffs in jurisdictions distant from New York, upon similar grounds and upon claims which were provable in said bankruptcy proceedings, and the plaintiffs have reason to believe and apprehend that these threats may and will be carried into execution and that the plaintiffs will be put to great and useless expense and suffer and be subjected to great annoyance and inconvenience in preparing for and attending to such suits and actions which may be brought in the courts of distant States.

31. The plaintiffs allege it is impossible and impracticable to make all the creditors of said firm of S. H. P. Pell & Co. parties to this action, but the plaintiffs offer to make and admit as additional parties defendant all persons claiming to be creditors of said S. H. P. Pell & Co. as may desire to come into this suit and be heard.

31. The plaintiffs have no adequate remedy at law and can
23 have no adequate relief except in this Honorable Court for the enforcement and execution of the orders, judgments and decrees of this Court, in the bankruptcy administration, and to the end that the defendants may, if they can, show why plaintiffs should not have the relief hereby prayed for, plaintiffs file this bill of complaint and pray that defendants may make a full disclosure and discovery of all the matters aforesaid according to the best of their knowledge, information and belief, and make true, full and direct answers to the matters hereinbefore stated, charged and alleged, but not under oath, and that an answer by the defendants under oath is hereby waived.

Wherefore, plaintiffs pray, may it please your Honors, to grant to plaintiffs writ or writs of injunction, conformable to the prayer of this complaint, and an ad interim restraining order, and also that a writ of subpœna issue out of and under the seal of this Court directed to said defendants, commanding them and each of them on a day certain to appear and answer under this bill of complaint, and to abide by and perform the orders and decrees of this Court in the premises.

Wherefore, plaintiffs pray the judgment and decree of this Honorable Court against the defendants:

1. Perpetually enjoining and restraining the defendants from taking any further and other steps or proceedings in the certain action brought in the Court of Common Pleas for the State of South Carolina, and removed as aforesaid, wherein the defendants herein are plaintiffs therein, and the plaintiffs herein are defendants therein, which shall proceed on the ground that Robert M. Thompson is liable as a general partner of S. H. P. Pell & Co. or otherwise, in respect to any claim which was provable in the bankruptcy proceedings aforesaid.

24 2. Perpetually enjoining the defendants from maintaining and continuing the present action brought in said Court of Common Pleas, and removed as aforesaid, and from instituting and commencing any other and further action, suits or proceedings against the plaintiffs herein as defendants therein based, founded or predicated upon the transactions set forth in the complaint (Exhibit 11) in the action in the Court of Common Pleas and removed as aforesaid and set forth in the complaint herein upon any ground in

respect to the matters set forth in paragraphs 3, 4 and 23 of this complaint.

3. Perpetually enjoining and restraining the defendants from attacking, questioning or challenging the power and jurisdiction of the District Court of the United States for the Southern District of New York, in bankruptcy to make and enter and the effect and extent of the orders and decrees aforesaid, excepting by and through appropriate proceedings in the said Bankruptcy Court, or by and through appropriate actions or suits in the United States District Court for the Southern District of New York.

4. And that the plaintiffs may have such ad interim or provisional orders enjoining and restraining the defendants as may be proper until the final judgment or decree, and for such other and further order, judgment or decree as may be just and proper in the premises.

MYERS & GOLDSMITH,
Attorneys for the Plaintiffs,
100 *Broadway, New York City.*

EMANUEL J. MYERS.
Of Counsel.

25 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Charles A. Kittle, being duly sworn, deposes and says that he is one of the plaintiffs in the above-entitled action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

CHARLES A. KITTLE.

Subscribed and sworn to before me this 15th day of August, 1918.

CECILIE ULLMAN,
Notary Public, Residing in New York County.
N. Y. Co. Clerk's No. 3; *Reg. No.* 9003.

26 EXHIBIT 1.

Petition of Logan & Bryan to Have Robert M. Thompson Adjudicated an Involuntary Bankrupt, etc.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

SIRS:

Take notice that upon the annexed petition of Logan & Bryan dated November 23, 1914 and the annexed affidavit of John G. Lonsdale verified November 23, 1914 and upon a written copy of the statements made by Robert M. Thompson before Peter B. Olney as Special Master in the above entitled proceedings and upon the petition in bankruptcy herein, the undersigned will make a motion at a term of this Court for the hearing of motions to be held at the U. S. Court House in the Post Office building in the Borough of Manhattan, City, County and State of New York on the 30 day of November, 1914 at 10.30 o'clock a. m. or as soon thereafter
27 as counsel can be heard for the relief demanded in the annexed petition.

Dated N. Y. November 23, 1914.

Yours, etc.,

WOLLMAN & WOLLMAN,
Attorneys for Logan & Bryan.

O. & P. O. Address. 20 Broad St., Borough of Manhattan, New York City.

To
Charles Pope Caldwell, Esq., Attorney for Bankrupts.
David H. Miller, Esq., Attorney for petitioning and other creditors.
Nicholl, Anable, Lindsay & Fuller, Esqs., Attorneys for Robert M. Thompson.
Stover & Hall, Esqs., Attorneys for W. R. Craig & Co.
Hawkins, Delafield & Longfellow, Esq-., Attorneys for Gwathmey & Company.
John V. Judge, Esq., Attorney for Peter A. Franklin, Jr.

28 United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of Logan & Bryan respectfully shows and alleges:

I. That at all the times hereinafter mentioned Logan & Bryan was and still is a copartnership composed of Benjamin B. Bryan, John G. Lonsdale, Stuart Logan, Howard H. Logan and Frank C. Hollinger and that said firm of Logan & Bryan was on July 31, 1914, and ever since has been a creditor of S. H. P. Pell & Co. a copartnership composed of Stephen H. P. Pell, Howland Haggerty Pell, Charles A. Kittle and Robert M. Thompson to the extent of over $30,000 and that said Logan & Bryan appear in the schedule of creditors heretofore filed herein by S. H. P. Pell & Co. as a creditor of said firm of S. H. P. Pell & Co.

29 Second. That heretofore certain creditors of said S. H. P. Pell & Co. filed an involuntary petition in bankruptcy in this Court in the above entitled proceeding against Stephen H. P. Pell, Howland Haggerty Pell and Charles A. Kittle individually and as partners doing business under the name of S. H. P. Pell & Co. That Robert M. Thompson is and on July 31, 1914 and prior to the filing of said petition in bankruptcy was and ever since then has been a general partner in said firm of S. H. P. Pell & Co. and a necessary and indispensable party to these proceedings but that said Robert M. Thompson was not made a party to these bankruptcy proceedings against the partnership of S. H. P. Pell & Co.

Third. That the acts of bankruptcy of said firm are set forth in the petition in bankruptcy of the petitioning creditors hereinabove referred to.

Fourth. That receivers have been appointed in this proceeding who have taken and now have possession of the copartnership assets of the firm of S. H. P. Pell & Co. which are worth over $1,000,000.

Fifth. That the assets of said firm and of the individual members thereof, except said Thompson at the time of the beginning of these proceedings were not and are not worth and will not realize within $1,000,000 of enough to pay the liabilities of said firm exclusive of any claim that said Robert M. Thompson makes against said firm.

Sixth. That said Robert M. Thompson stated upon his examination which took place in these bankruptcy proceedings that he did not have property and assets over and above all his debts and

30 liabilities to the extent of $800,000 and therefore your petitioner states the assets of the firm and of the individual mem-

bers thereof including the assets of said Thompson are not sufficient to pay the liabilities of said S. H. P. Pell & Co. in full.

Wherefore said Logan & Bryan pray that said Robert M. Thompson be made a party defendant to this proceeding and that the Clerk of the Court be directed to issue a subpœna to be served upon said Thompson as one of the alleged bankrupts in this proceeding and that the title of this proceeding be amended accordingly and that proper proceedings be taken herein to have said Robert M. Thompson as well as all the other members of said firm of S. H. P. Pell & Co. and said firm adjudicated bankrupts and for such other and further relief as may be proper in the premises.

Dated N. Y. November 23, 1914.

WOLLMAN & WOLLMAN,
Attorneys for Logan & Bryan.

31 United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

SOUTHERN DISTRICT OF NEW YORK,
State of New York, County of New York, ss:

John G. Lonsdale being duly sworn says: I am a member of the firm of Logan & Bryan composed of Benjamin B. Bryan, John G. Lonsdale, Stuart Logan, Howard H. Logan and Frank C. Hollinger. I have read the foregoing petition and all the statements made therein are true as I verily believe.

Of my own knowledge, I know that said Logan & Bryan is a creditor of S. H. P. Pell & Co. to the extent of more than $30,000 and that a petition in bankruptcy was filed herein against said S. H. P. Pell & Co. as set forth in the foregoing petition and that Robert M. Thompson made the statements which it is alleged in the foregoing petition of Logan & Bryan that he made.

32 The source of my information and the grounds of my belief that Robert M. Thompson is a general partner in said firm are statements which I heard said Robert M. Thompson make on his examination which took place in the above entitled proceedings, which statements are set forth in the transcript of the testimony of said Thompson which will be filed on this motion and inspection of the various contracts and documents produced on said examination.

The sources of my information and the grounds of my belief as to the assets of said firm of S. H. P. Pell & Co. are statements I heard one of the receivers make under oath, a circular gotten up by the receivers and by S. H. Pell & Co. and my knowledge gained since

the bankruptcy proceedings of the general nature and extent of the assets and liabilities of S. H. P. Pell & Co.

JOHN G. LONSDALE.

Sworn to before me this 23rd day of November, 1914.
[SEAL.] SAMUEL M. MURPHY,
Notary Public, No. 2514, *New York Co.*

33 EXHIBIT 2.

Petition of Morrison and Others to Have Robert M. Thompson Adjudicated an Involuntary Bankrupt, etc.

District Court of the United States, Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

Upon the affidavit of David H. Miller, verified the 28th day of November, 1914, upon the petition in bankruptcy filed herein on the 3d day of August, 1914, upon the petition of the intervening petitioning creditors, Nathaniel H. Morrison, Gayle L. Young and Heineken & Vogelsang, filed herein on the 28th day of November, 1914, and upon all other proceedings had herein, let the petitioning creditors herein, the alleged bankrupts herein, Robert M. Thompson, Logan & Bryan, W. R. Craig & Co., H. Hentz & Co., Gwathmey & Co., Peter A. Franklin, Jr. and Thompson & McKinnon, show cause before me or one of the Judges of the United States District Court for the Southern District of New York, at a Term of this
34 Court, to be held at the United States Court House, in the Post Office Building, in the Borough of Manhattan, City, County and State of New York, on the 30th day of November, 1914, at 10.30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, why the relief prayed for in the said petition of Nathaniel H. Morrison, Gayle L. Young and Heineken & Vogelsang, intervening petitioning creditors herein should not be granted, and why said intervening petitioning creditors should not have such other and further relief as may be just and proper.

Due cause appearing therefor, let service of a copy of this order and of the affidavit of David H. Miller, verified the 28th day of November, 1914, upon which it is granted, on the 28th day of November, 1914, be deemed due timely and sufficient service thereof.

Dated, New York, November 28, 1914.

AUGUSTUS N. HAND,
District Judge.

35 United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

Your petitioners Nathaniel H. Morison, Gayle L. Young and Heineken & Vogelsang hereby respectfully show to this Court and allege:

First. That heretofore and on the 3rd day of August 1914, a petition in bankruptcy was herein filed alleging that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell then were and had been partners doing business under the firm name and style of S. H. P. Pell & Company, and praying that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid as individuals and the *the* firm of S. H. P. Pell & Co. be adjudged bankrupt within the purview
36 of the Acts of Congress relating to bankruptcy of which said petition in bankruptcy a copy is hereto annexed for greater particularity and that said petition was with a subpœna duly served, and that this Honorable Court duly obtained jurisdiction of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, individually and of the firm of S. H. P. Pell & Co., and that no answer has been filed to said petition and no decree of adjudication in bankruptcy has been herein entered.

Second. Upon information and belief that on the said 3rd day of August, 1914, and for greater portion of the six months next prior thereto, the firm of S. H. P. Pell & Co. was and had been a copartnership composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and of Robert M. Thompson, and that the said Robert M. Thompson at all the said times was and had been a general partner in and of the said firm of S. H. P. Pell & Co. together with Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and that the said Robert M. Thompson was not at any of the said times and is not now a wage earner or a person engaged principally in farming or in the tillage of the soil.

Third. That the nature and amount of your petitioners' claims are as follows:

1. Claim of Nathaniel H. Morrison: That on the 31st day of July, 1914, and at all times prior thereto hereinafter mentioned, your petitioner was and now still is a member of the New York Cotton Exchange, a corporation duly organized under the laws of New York.

That at sundry times during the month of July 1914 and
37 prior to the 31st day thereof your petitioner at the special instance and request of the firm of S. H. P. Pell & Co. performed and rendered certain services for and to the said firm of

S. H. P. Pell & Co. upon the said New York Cotton Exchange and executed certain orders for the said firm of S. H. P. Pell & Co. upon the said exchange, pursuant to the by-laws rule- and regulations thereof.

That the reasonable value and agreed price, pursuant to the said by-laws, rules and regulations of said services so rendered by your petitioner as aforesaid is the sum of $21.75; that the said sum of $21.75 on the said 31st day of July, 1914, was and now still is due and owing to your petitioner from said firm S. H. P. Pell & Co. and that no part thereof has been paid.

Your petitioner Nathaniel H. Morison has not nor has any other person to the knowledge of your petitioner or for your petitioner's use, received any security for said demand whatsoever, except that your petitioner is entitled to a lien upon the memberships of the alleged bankrupts herein in The New York Cotton Exchange but that the amount to be realized by your petitioner from said lien or security will not and cannot exceed the sum of $1.00.

2. Claim of Gayle L. Young: That on the 31st day of July, 1914, and at all times prior thereto hereinafter mentioned, your petitioner was and now still is a member of the New York Cotton Exchange, a corporation duly organized under the laws of New York.

That at sundry times during the month of July, 1914, and prior to the 31st day thereof, your petitioner at the special instance and request of the firm of S. H. P. Pell & Co. performed and rendered certain services for and to the said firm of S. H. P. Pell & Co. upon the said New York Cotton Exchange and executed certain
38 orders for the said firm of S. H. P. Pell & Co. upon the said exchange, pursuant to the by-laws, rules and regulations thereof.

That the reasonable value and agreed price pursuant to the said by-laws, rules and regulations of said services so rendered by your petitioner as aforesaid, is the sum of $75.00; that the said sum of $75.00 on the said 31st day of July, 1914, was and now still is due and owing to your petitioner from said firm S. H. P. Pell & Co., and that no part thereof has been paid.

Your petitioner, Gayle L. Young has not nor has any other person to the knowledge of your petitioner, or for your petitioner's use, received any security for said demand whatsoever, except that your petitioner is entitled to a lien upon the memberships of the alleged bankrupts herein in the New York Cotton Exchange, but that the amount to be realized by your petitioner from said lien or security will not and cannot exceed the sum of $3.00.

3. Claim of Heineken & Vogelsang, a copartnership composed of Franz Schutte Jr., Hellmuth Maass, Ronald Williams, Percy Dews, J. P. Doughty, Harry L. Goss, George R. Seidenburg, and Charles J. Sorrells: At sundry times prior to July 31, 1914, your petitioner purchased from the said firm S. H. P. Pell & Co. 200 bales of cotton for delivery in the month of July 1914, for an aggregate purchase price of $11,730, and sold to the said firm S. H. P. Pell & Co. 2,000 bales of cotton for delivery as follows: 1,900 bales in the month of December, 1914, and 100 bales in the month of March, 1914 for an

aggregate selling price of $123,335, and that said sales and each of them were made in all respects pursuant to the by-laws, rules and regulations of the New York Cotton Exchange, a corporation
39 duly organized under the laws of New York, of which exchange said Franz Schutte, Jr., Charles J. Sorrells and Harry L. Goss are members.

That said 200 bales of cotton so purchased for delivery during the month of July, 1914, as aforesaid, were duly delivered on or about the 30th day of July, 1914, pursuant to the said by-laws, rules and regulations of the New York Cotton Exchange, and that upon such delivery your petitioner was obliged to pay and did pay pursuant to said by-laws, rules and regulations, and at the request of said S. H. P. Pell & Co., the sum of $70. in excess of the agreed purchase price aforesaid, which sum said S. P. Pell & Co. agreed pursuant to said by-laws, rules and regulations then to repay to your petitioner.

That pursuant to said by-laws, rules and regulations said firm S. H. P. Pell & Co. on July 31, 1914, being then members of said exchange, communicated to said exchange that they were unable to meet their obligations with other members at maturity; and that likewise pursuant to said by-laws, rules and regulations and to the terms of said contracts of sale, your petitioner closed in the open market of said New York Cotton Exchange on July 31, 1914, said contract for said 2,000 bales of cotton at an aggregate selling price of $100,-025, which left a balance due to your petitioner from said firm S. H. P. Pell & Co. in the sum of $23,310, which together with the above mentioned sum of $70, made the total sum of $23,380, due your petitioner from said firm S. H. P. Pell & Co. no part whereof has been paid except the sum of $6,981.08, leaving said sum of $16,398.92 due your petitioner from said S. H. P. Pell & Co.

Your petitioner, Heineken & Vogelsang has not nor has any
40 member of said firm, or any other person to the knowledge of your petitioner, or for your petitioner's use, received any security for said demand whatsoever except that your said petitioner is entitled to a lien upon the memberships of the alleged bankrupts herein in the New York Cotton Exchange, but that the amount to be realized by your said petitioner from said lien or security will not and cannot exceed the sum of $500.

Fourth. Your petitioners upon information and belief allege that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, the said Robert M. Thompson and the said firm S. H. P. Pell & Co. composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and of the said Robert M. Thompson, while insolvent and within four months next preceding the date of this petition, committed an act of bankruptcy in that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, and the said firm S. H. P. Pell & Co. did heretofore, to wit: on the 31st day of July, 1914, and with the knowledge, consent and approval of the said Robert M. Thompson, make a general assignment for the benefit of their creditors unto Theodore H. Price, and J. Edwards Wyckoff, which assignment was filed in the office of the Clerk of the County of New York on the 31st day of July, 1914.

Wherefore your petitioners pray leave to intervene herein, and that an order may be made and entered herein directing Charles W. Lee and Christian L. Clevenburg, co-partners doing business under the firm name of Charles W. Lee & Co., Marcus J. Parrott and Leigh M. Pearsall, petitioning creditors herein, forthwith to file herein a duplicate original of the petition by them heretofore filed
41 herein on the 3rd day of August, 1914; and that service of said duplicate original of said petition, together with service of this petition with a subpœna be made upon said Robert M. Thompson, individually and as a partner, together with Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid, doing business under said firm name S. H. P. Pell & Co. as provided in the Acts of Congress relating to bankruptcy; that the said Robert M. Thompson be made a party defendant to the above entitled proceeding; that the firm S. H. P. Pell & Co. heretofore prayed to be adjudged bankrupt in the aforesaid petition filed herein on the 3rd day of August, 1914 and now shown to be composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell aforesaid and of the said Robert M. Thompson be adjudged bankrupt; and that the said Robert M. Thompson individually be adjudged bankrupt, all within the purview of the said Acts, and that your petitioners have such other and further relief as may be just.

Dated, New York, November 28, 1914.

NATHANIEL H. MORISON,
GAYLE L. YOUNG,
HEINEKEN & VOGELSANG,
By CHARLES J. SORRELLS.

DAVID H. MILLER,
Attorney for Intervening Petitioning Creditors.

Office & Post Office Address, 15 William Street, Borough of Manhattan, City of New York, New York.

42 UNITED STATES OF AMERICA,
Southern District of New York,
State of New York, County of New York, ss:

Nathaniel H. Morison and Gayle L. Young intervening petitioners mentioned and described in the foregoing petition and Charles J. Sorrells of Heineken & Vogelsang, intervening petitioner mentioned and described in the foregoing petition do hereby severally make solemn oath that the statements of fact contained in the foregoing petition are true according to the best of their knowledge, information and belief, and that the said Charles J. Sorrells further makes oath that he is one of the said copartnership firm of Heineken & Vogelsang.

NATHANIEL H. MORISON.
GAYLE L. YOUNG.
CHARLES J. SORRELLS.

Subscribed and sworn to before me this 28th day of November, 1914.

[NOTARIAL SEAL.] BETH BEYER,
Notary Public, New York County, No. 188,
New York Register No. 6123.

43 District Court of the United States, Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Co., Alleged Bankrupts.

UNITED STATES OF AMERICA,
Southern District of New York,
State of New York, County of New York, ss:

David H. Miller, being sworn deposes and says:

First. That he is the attorney herein for Nathaniel H. Morison, Gayle L. Young and Heineken & Vogelsang, intervening petitioning creditors herein, and that the petition of the said intervening-petitioning creditors has been duly filed this day in the office of the Clerk of this Court, and that a copy thereof is hereto annexed, marked "A" and made a part of this affidavit.

Second. That heretofore and on the 23rd day of November, 1914, a motion upon the petition of Logan & Bryan, a partnership which is one of the creditors of the alleged bankrupts herein, verified
44 the 23rd day of November 1914, and praying that Robert M. Thompson be made a party defendant to this proceeding, and that the clerk of this Court be directed to issue a subpœna to be served upon said Thompson, as one of the alleged bankrupts in this proceeding, and that the title of this proceeding be amended accordingly, and that proper proceedings be taken herein to have said Robert M. Thompson as well as all the other members of said firm of S. H. P. Pell & Co. and said firm, adjudicated bankrupts, upon an affidavit of John G. Lonsdale in support thereof, verified the 23rd day of November, 1914, upon a written copy of the statements made by Robert M. Thompson before Hon. Peter B. Olney, as Special Master in the above entitled proceeding, and upon the petition in bankruptcy filed herein on the 3rd day of August, 1914, was noticed to be heard at a term of this Court for the hearing of motions, to be held on the 30th of November, 1914, at ten thirty o'clock in the forenoon thereof, for the relief demanded in the said petition.

Third. That the aforesaid petition of Logan & Bryan has not been filed in the office of the Clerk of this Court.

Fourth. That it is necessary to the due and proper protection of the interest herein of the aforesaid intervening petitioning creditors, of all other parties to this proceeding, of the estate of the firm of

S. H. P. Pell & Co. now in course of administration in this proceeding, and of the creditors interested in said estate, that a motion for the relief demanded in the said petition of the said intervening petitioning creditors be made and a hearing upon such motion
45 be had at the time the said motion upon the petition of Logan & Bryan comes on to be heard herein before this Honorable Court.

Wherefore deponent prays for an order directing all those who have duly appeared in this proceeding to show cause before this Court at a term thereof, to be held at the United States Court House in the Post Office Building in the Borough of Manhattan, City, County and State of New York, on the said 30th day of November, 1914, at 10.30 o'clock in the forenoon thereof, or as soon thereafter as counsel can be heard, why the prayer of said petition of said intervening petitioning creditors should not be granted, and why said intervening petitioning creditors should not have such other and further relief as may be just and proper.

DAVID H. MILLER.

Sworn to before me this 28th day of November, 1914.
[NOTARIAL SEAL.] BETH BEYER,
Notary Public, New York County, No. 188,
New York Register No. 6123.

46 EXHIBIT 3.

Subpœna Served upon Robert M. Thompson.

Subpœna.

UNITED STATES OF AMERICA,
Southern District of New York:

To Robert M. Thompson, in said District, Greeting:

For certain causes offered before the District Court of the United States of America, within and for the Southern District of New York, as a Court of Bankruptcy, we command and strictly enjoin you, laying all other matters aside and notwithstanding any excuse, that you personally appear before our District Court to be holden at the United States Court House and Post Office Building in said District on the 14th day of December 1914 to answer to petitions filed by Logan & Bryan on Nov. 30, 1914 and by N. H. Morison, G. L. Younge and Heineken & Vogelsang on November 28, 1914 and also to the original petition for adjudication of S. H. P. Pell, C. A. Kittle and H. H. Pell by M. J. Parrott et al. and filed on Aug. 3, 1914 in our said court, the said petitions filed on November 28 and November 30, 1914 praying that you may be adjudged a bankrupt; and to do further and receive that which our said District Court shall consider in this behalf. And this you are in no wise to omit under the pains and penalties of what may befall thereon.

The Honorable Charles M. Hough, Judge of said Court and
47 the seal thereof at the Borough of Manhattan City of New York this 30th day of November 1914.

ALEXANDER GILCHRIST, JR.,
Clerk.

Subpœna filed Dec. 7, 1914.

I hereby certify that on the 7th day of December 1914 at 43 Exchange Place, in the City of New York, in my district, I personally served the within subpœna upon the within named Robert M. Thompson by exhibiting to him the within original and at the same time leaving with him a copy thereof. I further certify that at the same time and place, I left with him a duplicate original of the creditor's petition for adjudication herein.

Dated New York December 7, 1914.

WM. HENKEL,
U. S. Marshal, Southern Dist., New York.

48 EXHIBIT 4.

Adjudication of S. H. P. Pell & Co.

In the District Court of the United States for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Company, Bankrupts.

At New York City, in said District, on the 25th day of November, 1914, before the Honorable Julius M. Mayer, Judge of the said Court in Bankruptcy, the petition of Marcus J. Parrott, Leigh M. Pearsall and Charles W. Lee & Company, a partnership composed of Charles W. Lee and Christian L. Clevenberg, that Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell as individuals and the firm of S. H. P. Pell & Company be adjudged bankrupts, within the true intent and meaning of the Acts of Congress relating to bankruptcy, having been heard and duly considered and duplicates of said petition together with a subpœna commanding said bankrupts to appear and answer said petition having been duly served upon the said bankrupts and said bankrupts having duly appeared herein by their attorney and no answer having been made or filed by said
49 bankrupts, and the time of said bankrupts within which to answer or plead having expired, the said Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and the firm of S. H. P. Pell & Co. (referred to in the petition herein) are hereby declared and adjudged bankrupts accordingly.

And it is further ordered that the said bankrupts file schedules in triplicate as required by law within ten days from the date hereof.

And it is further ordered that the said matter be referred to Peter B. Olney, one of the referees in bankruptcy of this Court, to take all such further proceedings therein as are required by said Acts of Congress, and all such acts therein as the Court might take or perform, except such as by law or the general orders of the Supreme Court are required to be performed by the Judge; and that the said bankrupts shall attend before said Referee on the 30th day of November, 1914, at 10 o'clock A. M., and thenceforth shall submit to such orders as may be made by said referee or by the Court relating to their said bankruptcy.

Witness, the Honorable Julius M. Mayer, Judge of the said Court, and the seal thereof, at the City of New York, in said District, on the 25th day of November, A. D. 1914.

JULIUS M. MAYER,
District Judge.

[SEAL.]

ALEX. GILCHRIST, JR.,
Clerk.

JULIUS M. MAYER,
United States District Judge.

A true copy.
ALEX. GILCHRIST, JR.,
Clerk.

EXHIBIT 5.

Excerpt from Schedules in Bankruptcy Filed by the Firm of S. H. P. Pell & Co., and by Stephen H. P. Pell, Charles A. Kittle, and Howland H. Pell individually in the bankruptcy proceedings against S. H. P. Pell & Co. in the United States District Court for the Southern District of New York.

Schedule A-3 (Continued).

Reference to ledger or voucher.	Name creditor.	Residence.	When and where contracted.	Nature and consideration of the debt and whether any judgment, bond, bill of exchange, promissory note, etc., and whether contracted as partner or joint contractor with any other person, and if so, with whom.	Amount.
637	Robert M. Thompson.	Southampton, L. I.	N. Y.	Stocks & Cotton.	$3,373,082.30

W. GORDON MC CABE, JR., AND WILLIAM F. GRAY. 27

THIS PAGE BOUND

51 EXHIBIT 6.

Offer of Composition.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Partners Doing Business under the Firm-name and Style of S. H. P. Pell & Company, Bankrupts.

To Peter B. Olney, Esq., Referee in Bankruptcy, and the Creditors of Stephen H. P. Pell, Charles A. Kittle, and Howland H. Pell, individually and as co-partners doing business under the firm-name and style of S. H. P. Pell & Company, bankrupts:

The undersigned, whose schedules of their property and lists of their creditors, required by law to be filed, have previously been filed herein and who have been examined at a meeting of their creditors herein, do hereby offer terms of composition to their creditors (excepting such creditors as are by law entitled to priority) as follows:

First. This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle and How-
52 land H. Pell, from their debts, both individual and partnership, and of the release of Robert M. Thompson from any and all liability to said S. H. P. Pell & Co. and from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm.

Second. All the assets of every name and nature of S. H. P. Pell & Co., and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, individually, shall be transferred to and vested in John W. Jay, who shall issue certificates of participation in the proceeds of such assets to the creditors herein of S. H. P. Pell & Co. as hereinafter provided: The title of said John W. Jay as to said individual assets of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell shall be subject to the claims allowed herein against the respective estates in bankruptcy of said individuals.

Third. Upon the confirmation of this composition, the Receivers herein shall transfer and deliver unto John W. Jay all the assets and property of every name and nature, of S. H. P. Pell & Co. and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually, which are or may come into their hands or under their control, and said Receivers shall execute and deliver to said Jay an assignment and conveyance to said Jay of all of the assets and property of S. H. P. Pell & Co., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and of all the right, title and interest of S. H. P. Pell & Co., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell in and to the same. Each of the bankrupts herein agrees at any

time when requested by said Jay to execute and deliver to him
53 any and all assignments or conveyances that said Jay shall require by way of further assurance or otherwise to perfect his title thereto.

Fourth. Said John W. Jay shall execute, deliver and file herein a trust agreement, in respect of such assets so received by him, in the form hereto annexed, marked Exhibit "A" and made a part hereof.

Fifth. Each creditor of S. H. P. Pell & Co. whose claim has been or shall be allowed in this proceeding, shall receive from said John W. Jay a certificate of participation in the net proceeds of such assets in the form hereto annexed, marked Exhibit "B" and made a part hereof, and entitling such creditor to receive such proportion of the net proceeds of such assets as the amount of the claim of such creditor as allowed in this proceeding, and as stated in such certificate of participation, shall bear to the total amount of claims against S. H. P. Pell & Co. allowed in this proceeding, and the like total amount of such certificates of participation so issued.

Sixth. As to any assets delivered to John W. Jay which are subject to reclamation proceedings, the vesting of title thereto in said Jay as hereinbefore provided shall be subject to the respective rights, if any, of all parties to such reclamation proceedings respectively, heretofore had, now pending or which may be hereafter brought.

Seventh. The claims of the creditors of S. H. P. Pell & Co. whose names and the amounts due such creditors respectively are set forth in Schedule "C" hereto annexed and made a part hereof shall be reduced from such respective amounts by the respective amounts, if any, received by said respective creditors from the sale or proceeds of the three seats in the New York Cotton Exchange now stand-
54 ing in the names of Stephen H. P. Pell and Charles A. Kittle, bankrupts herein, or from the sale or proceeds of the seat in the New York Stock Exchange now standing in the name of Howland H. Pell, bankrupt herein.

Eighth. In consideration of the delivery and transfer to be made as a part of this composition to Robert M. Thompson by the Receivers of S. H. P. Pell & Co. of 20,000 shares of the capital stock of the North Butte Mountain Copper Co., the property of said partnership, and for all the other considerations moving hereunder to Robert M. Thompson, no claim of said Robert M. Thompson against S. H. P. Pell & Co. or against Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell individually, shall be filed, allowed or proved herein, and any and every such claim of Robert M. Thompson shall be waived and released by said Robert M. Thompson.

Ninth. Each and every creditor of S. H. P. Pell & Co. who shall assent to this offer of composition shall, upon the final confirmation of such composition by the Court, be deemed conclusively by his said assent thereto to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co. or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co.

Tenth. It shall be adjudged herein that Robert M. Thompson is the owner of all the securities now pledged for certain loans made to S. H. P. Pell & Co., the names of the respective lenders and the respective securities pledged therefor being set forth in Schedule "D"

hereto annexed and made a part hereof, subject to the respective loans for which the same are pledged and to the liens for the
55 payment thereof, and an order shall be entered herein adjudging said securities set forth in said Schedule "D" to be the property of said Robert M. Thompson, subject as aforesaid, and directing the Receivers herein to release to the said Robert M. Thompson all the right, title and interest of the estate in bankruptcy of S. H. P. Pell & Co., Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell in and to said securities, upon the written assumption by Robert M. Thompson of all liability upon said loans respectively and upon his agreement to hold harmless the estate in bankruptcy of S. H. P. Pell & Co., its successors and assigns, from any and all loss, damage and expense by reason thereof. Said Robert M. Thompson shall, within forty-five days from the date of the confirmation of this composition, deliver to said Jay evidence satisfactory to said Jay that the liability of the estates in bankruptcy of S. H. P. Pell & Co. and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell on or on account of all said loans has been released, discharged or extinguished.

Eleventh. Certain securities and property now in the possession of the Receivers of S. H. P. Pell & Co., and set forth in Schedule "E" annexed and made a part hereof, shall be adjudged to be the property of Robert M. Thompson, and said Receivers shall, upon his compliance with the provisions of paragraph Tenth hereof, be authorized and directed to deliver said securities and property set forth in said Schedule "E" to said Robert M. Thompson, free and clear of any and all claims of S. H. P. Pell & Co., and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, their successors or assigns, to such securities and property. All the securities and property re-
56 ferred to in Schedule "E" shall be held as security for the performance by said Thompson of all the provisions of paragraph Tenth hereof.

Twelfth. It shall be adjudged herein that the following securities heretofore pledged (together with other securities) by S. H. P. Pell & Co. are the property of Robert M. Thompson subject (with such other securities) to the liens of the respective pledgees thereof whose names are below set opposite the descriptions of the securities of said Thompson so pledged with them respectively:

Name of Security.	Pledged With.
600 sh. International Nickel Co. preferred	Bankers Trust Co.
350 sh. International Nickel Co. preferred	Manhattan Co.
$30,000 American Ice Securities 6% Debentures	Manhattan Co.
1,000 sh. American Ice Sec. Co	Manhattan Co.
400 sh. Missouri, Kansas & Texas common	Manhattan Co.
$15,000 American Ice Securities 6% Debentures	Columbia Trust Co.
700 sh. Southern Railway Pfd	Kuhn, Loeb & Co.
100 sh. Southern Railway Pfd	Century Bank
200 sh. Missouri, Kansas & Texas common	Century Bank
500 sh. Southern Railway Pfd	Market & Fulton National Bank
100 sh. Missouri, Kansas & Texas common	Market & Fulton National Bank

57 And it shall further be decreed that as between said Thompson and the bankrupt estate of S. H. P. Pell & Co., its creditors, successors and assigns, the pledged securities of said Thompson shall with respect to each individual loan bear such and only such proportion of the burden of the lien of said loan as the value of his securities pledged therefor bears to the total value of all the collateral to such loan. For the above purpose, the basis for the valuation of collateral shall be: (1) with respect to collateral which has been or shall be sold or otherwise realized upon by the pledgee, the amount realized thereon, and (2) with respect to collateral which shall remain unsold after the discharge of the lien thereon, the last public quotation therefor previous to the final sale of collateral to such loan by the pledgee; and the amount of each loan and the amount of the collateral thereto shall be determined as of the date of the first sale (and immediately prior to such sale) by the pledgee of any collateral thereunder (whether heretofore or hereafter had). There shall be no liability to said Thompson on the part of the estate of S. H. P. Pell & Co. by reason of any rights or claims of any person other than said S. H. P. Pell & Co. or Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell, who claims or shall claim any of the collateral in the loans referred to in this paragraph.

Thirteenth. Except as hereinbefore provided, Robert M. Thompson shall release any and all claims to all property, securities and assets of every kind, in the possession or under the control of the Receivers or heretofore pledged by said S. H. P. Pell & Co.

Fourteenth. The intervening petitions herein of Logan & Bryan and of Heineken & Vogelsang, et al. shall be dismissed with-
58 out costs, and an order to that effect shall be entered herein.

Fifteenth. There shall be paid by the Receivers herein all claims against S. H. P. Pell & Co., if any, which are by law entitled to priority, and also all costs and disbursements of the referee, of the Receivers and of the attorneys for the Receivers, petitioning creditors, said intervening petitioning creditors and the bankrupts, all of which shall be passed upon by the Court upon the confirmation of this composition or at such other time as the Court shall direct.

Sixteenth. Nothing in this offer contained or in any assent thereto by Robert M. Thompson or in any acceptance thereof by any creditor of S. H. P. Pell & Co. or of Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell shall be or shall be construed as an agreement, consent or admission for any purpose whatever unless this composition shall be confirmed by the Court.

Dated, December 21, 1914.

STEPHEN H. P. PELL,
CHARLES A. KITTLE,
HOWLAND H. PELL,
Bankrupts.

EXHIBIT "A."

Agreement made this — day of ——, 1915, by and between John W. Jay, of the County and State of New York (hereinafter called The Trustee) party of the first part, and the creditors of S. H. P.
59 Pell & Co. whose claims have been or shall be duly allowed by the District Court of the United States for the Southern District of New York in a certain proceeding in bankruptcy now pending in said Court, entitled "In the Matter of S. H. P. Pell et al., Bankrupts" (hereinafter called Creditors) parties of the second part:

Whereas, certain assets of said S. H. P. Pell & Co., pursuant to an order of said Court in said proceeding, duly entered on the — day of ——, 1915, have been or will be transferred to and vested in title in the Trustee.

Now therefore, in consideration of the premises and of the mutual covenants and promises herein contained, it is agreed as follows:

First. Each creditor of said S. H. P. Pell & Co. whose claim has been or shall be duly allowed by said Court in said proceeding shall receive from the Trustee a certificate of participation in the net proceeds of the assets of said S. H. P. Pell & Co. transferred to and vested in title in said Trustee, in substantially the form hereto annexed marked Exhibit "B" and made a part thereof.

Second. All assets of said S. H. P. Pell & Co. of every name and nature, delivered or transferred, or which shall be delivered or transferred to said Trustee, pursuant to said order of said Court hereinbefore mentioned, shall be held by said Trustee in trust for the benefit pro rata of the creditors of said S. H. P. Pell & Co. whose claims have been or shall be duly allowed, as aforesaid, and to whom certificates of participation have been or shall be issued, as aforesaid, subject to the terms and provisions of this agreement.

60 Third. All the assets received, or which shall be received, by said Trustee of the individual estates in bankruptcy of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, pursuant to said order of said Court, shall subject to the claims allowed in said proceeding against the respective estates in bankruptcy of said individuals, and to the payment of said respective claims from said respective assets and the proceeds thereof, be regarded as assets of said S. H. P. Pell & Co. for all purposes of this agreement.

Fourth. The Trustee shall, with all due diligence, proceed to realize, collect and convert into cash all assets of said S. H. P. Pell & Co. of every name and nature, which shall be delivered, conveyed or transferred to said Trustee, and said Trustee shall have full power and authority to sell at public or private sale, at such times and upon such terms and for such price or consideration as he shall in his discretion deem advisable, any or all of such assets, and to compromise for such an amount or upon such consideration as he shall deem best any claims or rights of action existing or claimed to exist,

or which shall exist or shall be claimed to exist in favor of S. H. P. Pell & Co. or Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell, individually, as he in his discretion may deem proper, and to bring, defend or intervene in any action, suit or proceeding in his name or otherwise, in respect of such assets or any of them, or in respect of any matter or thing in any way connected with or related to the business, property or affairs of said S. H. P. Pell & Co. or of Stephen H. P. Pell, Charles A. Kittle or Howland H. Pell, individually, or connected with or related to this agreement as he may deem proper, and to compromise, discontinue or prosecute
61 any such action, suit or proceeding in his discretion and generally, but without limiting any particular or specific words herein contained, to deal with and realize upon said assets in every respect as the absolute legal owner thereof might do.

Fifth. The proceeds of said assets, as and when received and realized in cash, shall be by said Trustee applied first to the payment of all taxes, charges and expenses, including counsel fees, incurred in and about the performance of this agreement and also including a reasonable compensation for the services of the Trustee hereunder to be from time to time determined by the committee hereinafter named, and any surplus remaining shall be by said Trustee paid and distributed pro rata among the creditors of said S. H. P. Pell & Co. whose claims have been or shall be allowed, as aforesaid, and to whom certificates of participation have been or shall be issued, as aforesaid, in proportion to the respective claims of such creditors. The term "Creditor" as herein used shall be deemed to include the holder of record for the time being of any such certificate of participation so issued.

Sixth. Subject to the advice of counsel, a distribution of the proceeds of said assets of said S. H. P. Pell & Co. as and when received, shall be made by said Trustee whenever the amount so received and on hand, after allowing for taxes, charges and expenses paid, incurred or reasonably expected to be incurred, shall equal five per centum of the total amount of the claims of creditors of said S. H. P. Pell & Co. duly allowed as aforesaid, and for which certificates of participation, as aforesaid, shall have been issued.

62 Seventh. For the purposes of this agreement, a committee is hereby appointed, hereinafter called The Committee, consisting of Archibald B. Gwathmey, Jr., Nathaniel L. Carpenter, R. M. Stuart Wortley, W. Hustace Hubbard, Walter L. Johnson, William C. Fraser and John G. Lonsdale. In event of any vacancy or vacancies occurring in said Committee at any time or from time to time, the remaining member or members of the Committee for the time being shall appoint other persons or person to fill such vacancy or vacancies, and any person so appointed shall have all the powers of a member of the Committee as if herein named. The term "Committee" as herein used, shall mean the Committee as now or hereafter constituted. The Committee shall, from time to time, pass upon and fix the reasonable value of the services of the Trustee hereunder and the reasonable value of the services of any counsel retained by the Trustee hereunder, and the decision of the Committee in each such

case shall be final and conclusive. The Committee may in any case act by a majority of the members thereof for the time being, with or without a meeting, and the reasonable expenses of the Committee hereunder shall be deemed to be part of the expenses of the Trustee, but the members of the Committee shall receive no compensation for their services. The Trustee may in his discretion from time to time apply to said Committee for advice.

Eighth. In event of the death, refusal, inability or failure for any cause, of the Trustee to act hereunder, the Committee shall designate in writing a successor Trustee, and upon the filing with the Committee of the written acceptance of such designated successor of such designation and of this agreement, all assets then held by the
63 former Trustee hereunder and all proceeds of any assets not theretofore distributed, shall be transferred to and be vested in such successor Trustee without further act or deed.

Ninth. The Committee may from time to time require the Trustee to give a bond satisfactory to the Committee and in such amount as they shall determine, conditioned upon the faithful performance by the Trustee of this agreement.

Tenth. The term "Trustee" as herein used, shall be deemed to include any successor designated by the Committee, and the power of the Committee to designate a successor Trustee may be exercised from time to time when necessary.

Eleventh. Neither the Trustee nor any member of the Committee shall be liable for any act done or omitted under the advice of counsel, nor for any mistake of fact or law, nor for any act or omission of any agent or attorney chosen in good faith and with reasonable discretion, nor in any event except for his own wilful negligence or bad faith.

Twelfth. Each creditor of S. H. P. Pell & Co. by accepting a certificate of participation hereunder, shall become a party hereto and shall thereby agree to and be bound by each and every provision, term and condition herein contained and also by each and every provision, term and condition contained in said order of The District Court of the United States for the Southern District of New York, duly entered on the — day of ——, 1915, in said proceeding entitled "In the Matter of S. H. P. Pell et al., Bankrupts," to which order reference is hereby made.

Thirteenth. The filing of this agreement in the office of the
64 Clerk of the District Court of the United States for the Southern District of New York shall be deemed a delivery hereof.

Fourteenth. This agreement and each covenant and promise herein contained shall bind each party hereto, his heirs, executors, administrators, successors and assigns, and shall be construed according to the laws of New York.

In witness whereof, said John W. Jay has hereto subscribed his name, affixed his seal, and delivered this agreement, on the day and year first above written.

—— —— [L. S.]

EXHIBIT "B."

No. —. $—.

Estate of S. H. P. Pell & Co.

Participation Certificate

This certifies that —— —— is entitled to participate, together with the holders of record of like certificates hereto, in the net proceeds of certain assets of the estate of S. H. P. Pell & Co. in bankruptcy, heretofore or hereafter transferred to the undersigned as Trustee, pursuant to a certain order of the District Court of the United States for the Southern District of New York duly entered on the — day of ——, 1914, in a proceeding in bankruptcy entitled "In the Matter of S. H. P. Pell et al., Bankrupts," in the proportion that $— (the amount of the claim heretofore filed by the holder to whom
65 this certificate now is, or to whom a like certificate in amount hereof before transfer was originally issued and duly allowed in and by said Court) bears to the total amount of the claims against said S. H. P. Pell & Co. allowed or to be allowed by said Court in said proceeding, and in respect of which like certificates heretofore have been or hereafter are to be issued, as in said order provided.

This certificate is issued subject to the terms of said order of said Court to which reference is hereby made, and also subject to the terms of an agreement of trust executed by John W. Jay and dated the — day of ——, 1915, to which reference is hereby made, and the holder hereof by accepting this certificate hereby expressly binds himself to each and every provision, term and condition in said order and in said agreement of trust contained.

This certificate is transferable only on the books kept for that purpose by the undersigned, at the office of the — Trust Company, or its successor or successors, as agent for the transfer of such certificates, by the registered holder, either in person or by attorney duly authorized, according to the provisions of said agreement of trust and according to the rules from time to time established for that purpose by the undersigned, and on surrender of this certificate properly endorsed, and until so transferred the undersigned may treat the registered holder as owner hereof for all purposes whatsoever.

Payments hereunder shall be made only upon presentation of this certificate to the undersigned for endorsements of said payments thereon.

This certificate is not valid unless countersigned by the said
66 — Trust Company as agent for the transfer of certificates, or its successor or successors, as said agent.

In witness whereof, the undersigned has executed this certificate this — day of ——, nineteen hundred and fifteen.

(Estate of S. H. P. Pell & Co.)

(Participation Certificate.)

(Reverse.)

Payments made under within certificate.

Date.	*Amount Paid.*	*Signature.*
*	*	*

For value received — hereby sell, assign and transfer unto — all the property, right, title and interest represented by the within certificate, the transferee to take the same subject to all the terms and conditions of the order and of the agreement referred to therein and do hereby irrevocably constitute and appoint —— —— Attorney to do all acts necessary to transfer said property, right, title and interest, with full powers of substitution in the premises.

Witness — hand this — day of ——, 191—.

In presence of

—— ——.

—— ——.

67 SCHEDULE "C."

Name of Creditor.	Amount Due.
Browning & Co. (the amount due Browning & Co. is subject to an application herein by one Hicks which may reduce such amount)	$44,958.50
H. F. Bachman & Co	34,346.55
Finley, Barrell & Co	986.65
Baruch Bros.	1,123.53
John F. Black & Co	27,838.85
J. S. Bache & Co	21,036.38
Bailey & Montgomery	16,728.80
Bailey & Guild	2,204.08
Byrne & McDonnell	10,518.91
Geo. Brennecke & Co	5,215.00
Caldwell Cosgrove & Co	1,335.00
E. K. Cone	1,312.03
S. B. Chapin & Co	22,881.68
Carpender & McClave	840.00
Henry Clews & Co	1,985.00
Chisholm & Chapman	6,729.46
Dick Bros. & Co	52,455.00
W. R. Craig & Co	131,039.17
Chas. Fairchild & Co	6,553.44

Name of Creditor.	Amount Due.
Gwathmey & Co.	135,445.22
S. Gruner & Co.	15,260.19
Hubbard Bros. & Co.	139,340.93
E. F. Hutton & Co.	65,410.89
Henry Hentz & Co.	115,138.46
Herklotz Corn & Co.	43,689.86
R. H. Hooper & Co.	27,238.81
Halle & Steiglitz	1,082.19
H. L. Horton & Co.	4,845.00
Hopkins, Dwight & Co.	5,267.59
68 Heineken & Vogelsang	16,398.92
Harris Winthrop & Co.	1,385.00
W. E. Hutton & Co.	170.00
C. I. Hudson & Co.	6,593.96
L. de Gumoens & Son	177.75
Geo. F. Jones & Son	6,789.01
Jenks, Gwynne & Co.	53,601.32
Daniel O'Dell & Co.	9,290.49
Judson & Co.	2,328.71
Josephthal Louchheim & Co.	22,292.50
Chas. W. Lee & Co.	1,730.00
Arthur Lipper & Co.	10,020.00
Logan & Bryan	30,769.62
Lehman Bros.	17,639.08
Miller & Co.	23,388.34
Mohr, Hanemann & Co.	13,860.00
Moyse & Holmes	38,712.37
Norman Mayer & Co.	92,113.69
Geo. H. McFadden & Bro.	29,853.34
Robert Moore & Co.	14,648.18
Newborg & Co.	16,236.71
A. Norden & Co.	9,186.51
Newman Bros. & Worms	32,912.90
Orvis Bros. & Co.	25,562.27
Post & Flagg	50,785.00
M. J. Parrott	4,650.00
Raymond Pynchon & Co.	47,409.98
Royce & Co.	18,480.76
Rogerson & Donnell	5,205.00
R. H. Rountree & Co.	12,595.17
E. & C. Randolph	16,840.15
Renskorf, Lyon & Co.	22,722.70
Morris H. Rothschild & Co.	37,826.05
Wm. Ray & Co.	14,139.03
69 N. L. Carpenter & Co.	104,225.98
Springs & Co.	5,737.28
Seligman & Meyer	2,044.02
Shearson, Hammill & Co.	115,034.86
Geo. C. Searle & Son	8,489.43
L. H. Starkey & Co.	30,337.37

Name of Creditor.	Amount Due.
Rhd. Siedenburg & Co.	13,495.48
Geo. M. Schutt & Co.	51,151.99
Sternberger, Sinn & Co.	10,721.56
Thompson, Towle & Co.	32,225.83
Atwood Violett & Co.	2,215.00
S. M. Weld & Co.	113,895.00
A. L. Wolff & Co.	38,110.84
Wrenn Bros. & Co.	13,153.50
J. R. Williston & Co.	41,633.44
Wardwell & Adams	135.00
Woodward & Stillman	7,444.84

70 SCHEDULE "D."

Name of lender.	Original amount of loan.	Securities pledged.
Guaranty Trust Company	$100,000	1200 shs. International Nickel Company Common.
Guaranty Trust Company	$100,000	1200 shs. International Nickel Company *Common.*
Guaranty Trust Company	$200,000	2200 shs. International Nickel Company Common.
Guaranty Trust Company	$100,000	700 shs. International Nickel Company Common. 600 shs. International Nickel Company Preferred.
J. P. Morgan & Company	$100,000	1200 shs. International Nickel Company Common.
Lazard Freres	$100,000	1300 shs. International Nickel Company Common.
Astor Trust Company	$100,000	1200 shs. International Nickel Company Common.
Equitable Trust Company	$100,000	1300 shs. International Nickel Company Preferred.
Brooklyn Trust Company	$100,000	800 shs. International Nickel Company Common. 400 shs. International Nickel Company Preferred.
Metropolitan Trust Co.	$100,000	1200 shs. International Nickel Company Common.
Metropolitan Trust Co.	$100,000	100 shs. International Nickel Company Preferred. 4300 shs. American Ice Securities Co. $35,000 American Ice 6% Debentures.
Empire Trust Company	$100,000	1200 shs. International Nickel Company Common.
Liberty National Bank	$100,000	1200 shs. International Nickel Company Common.
Liberty National Bank	$100,000	800 shs. International Nickel Company Common. 500 shs. International Nickel Company Preferred.
Liberty National Bank	$25,000	350 shs. International Nickel Company Preferred.
Seaboard National Bank	$100,000	1200 shs. International Nickel Company Common.

Name of lender.	Original amount of loan.	Securities pledged.
Seaboard National Bank.....	$100,000	1200 shs. International Nickel Company Common.
Seaboard National Bank.....	$100,000	1200 shs. International Nickel Company Common.
Bankers Trust Company.....	$100,000	1200 shs. International Nickel Company Common.
Bankers Trust Company.....	$100,000	1200 shs. International Nickel Company Common.
Bankers Trust Company.....	$100,000	1200 shs. International Nickel Company Common.
James Talcott	$25,000	300 shs. International Nickel Company Common.

71 SCHEDULE "E."

List of Securities and Property Alleged to Belong to Robert M. Thompson, in the Possession of the Receivers of S. H. P. Pell & Co.

Bonds.

$15,000	Bayonne Casting Co.
18,000	Atlantic, Gulf & West Indies 5%.
1,000	National Golf Links of America 5% deb.
52,500	International Motor Co. 6's Series B.
8,900	American Ice Sec. Debenture 6's.
12,500	Manoti Sugar Syndicate Participation.
1,000	Army and Navy Club of Washington 5%.
7,500	International Contract Vending Co. 6%.
400	Shawmut S. S. Co. 6%.
25,000	Consolidated Arizona Smelting Co. Income Bonds.

Stocks.

228	Atlantic, Gulf & West Indies Preferred.
114	Atlantic, Gulf & West Indies Common.
100	International Motor Company Preferred.
1,050	International Motor Company Common.
525	International Contract Vending Co.
250	Acme Graphite Company, Preferred.
750	Acme Graphite Company, Common.
$76.21	Preferred Scrip New Orleans Mobile & Chicago.
5.22	Common Scrip New Orleans, Mobile & Chicago.
2,500	Northern Ventures, Ltd.
89	National Bank of North America.
200	Pell's Spot Cotton Co.
50	American Ice Securities, Common.
150	Tide Water Paving Brick Co., Preferred.
75	Tide Water Paving Brick Co., Common.
50	Rome Wire Co., Preferred.
12½	North Eastern Agency.
30	Long Island Motor Parkway Co., Preferred.
15	Long Island Motor Parkway Co., Common.
100	Steel Package Co., Preferred.
50	Steel Package Co., Common.
11	Southern Ry. Co., Preferred.
11	Southern Ry. Co., Common.
2	Dupont Powder Co., Preferred.
2	Newport Reading Rooms.
1	South Side Sportsman Club.
102	Price Campbell Cotton Picker Co., Pfd.

200	Price Campbell Cotton Picker Co., Common.
$12.01	Price Campbell Cotton Picker Co., Pfd. Scrip.
1,484.07	Price Campbell Cotton Picker Co., Common Scrip.
25	Nassau Light & Power Co.
2	Founders Co.
25	Sprague Development Co.
100	Portsmouth Engine Co.
5	Washington Riding Co.

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$41.67	International Contract Vending Co. Scrip.
2	Shawmut S. S. Co., Preferred.
10	Shawmut S. S. Co., Common.
$50	Shawmut S. S. Co., Preferred Scrip.
18	International Nickel Co., Non-Voting Pfd.
25	International Nickel Co., Voting Trust, Pfd.
37	International Nickel Co., Common, Non-voting.
$30	Check dividend on 12 International Nickel Com. in Name S. H. P. Pell, due Sept. 1, 1914.

Mining Stock.

39,375	shs.	North Butte Mountain Copper Co.
2,050	"	San Toy Mining Co.
1,100	"	Tri Bullion Smelting & Development Co.
1,033	"	Dome Mines Co.
100	"	Malones Mines Co.
10,000	"	Pueblo Mining Co.
70,000	"	Colorado-Arizona Mines.
36,137	"	Consolidated Arizona Smelting Co.

Notes.

$18,000	Note, John L. McNeil, Demand Order Robert M. Thompson, Collateral 125 shs. First National Bank Durango, Dated July 11, 1914.
17,946.08	Note, G. B. Garrison, Order Pell & Co. Collateral 7,000 shs. California Nevada Copper Co. 3,759 shs. Cash Mines Co., Dated May 5, 1914. Due Sept. 5, 1914. Past Due.
5,000	Note, C. N. Fairchild, Order S. H. P. Pell & Co. on demand. Dated Feb. 14 1911.
5,000	Note, G. B. Garrison. Order S. H. P. Pell & Co. (6 mos.) Collateral 50 shs. Middleton-Garrison Feature Film Co. Dated Oct. 23, 1913. Due Apr. 23, 1914. Past Due.
4,080	Note, Ella A. Boriand. Order Robert M. Thompson. Dated Aug. 20, 1914. Due Dec. 20, 1914.
1,000	Note, Bessie H. Kane, Order S. H. P. Pell & Co. Collateral 10 Pacific Hardware & Steel Pfd. Dated April. 21, 1914. Due Oct. 21, 1914.
$10,000	Note, William H. Staton, Order American Exchange Natl. Bank (3 mos.). Collateral Upper Hudson Stone Quarry Co. Dated Jan. 5, 1914. Due April 2, 1914.
2,000	Note, Bessie H. Kane. Order R. M. Thompson (3 mos.). Collateral 20 shs. Pacific Hardware & Steel Co. pfd. Dated Oct. 28, 1913. Due Jan. 28, 1914. Past Due.
11,390.75	Note, S. A. Benner. Order R. M. Thompson. Dated May 14, 1914. Due Nov. 14, 1914. Past Due.
1,000	Note, Robert T. Garrison. Order S. H. P. Pell. Endorsed. (1 Yr.). Dated June 20, 1914. Due June 20, 1915.
500	Note, Robert T. Garrison. Order S. H. P. Pell. Endorsed. (6 mos.). Dated June 20, 1914. Due Dec. 20, 1914.
400	Note, Chas. T. and K. M. Heilier. Order Blue Diamond Fruit Co. Endorsed to S. H. P. Pell & Co. (1 yr.). Dated July 1, 1914. Due July 1, 1915.

800	Note, J. K. Williams, Jr., Order Blue Diamond Fruit Co. Endorsed to S. H. P. Pell & Co. (1 yr.). Dated July 20, 1914. Due July 20, 1915.
14,532.50	Note, Chas. E. Gibbs. Order R. M. Thompson (6 mos.). [Note in hands of attorneys.] Collateral 62 Pacific Hdw. & Steel Com. 115 Pacific Hdw. & Steel, pfd. Dated Sept. 16, 1912. Due Mar. 16, 1913.

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Miscellaneous.

25,000	Policies on life Francis W. Belknap, Massachusetts Mutual Life Ins. Co.
2,000	Bond & Mtge. Chas. E. Frankenbach to R. M. T.
2	Blank checks American Exchange National Bank.
2	Blank checks Corn Exchange Bank.
2	Notes, New York Trust Co.

Drafts on National Provincial Bank of London:

25240		296739
25241	(mutilated)	296740
25242		296749
25243		296584
25244		296579.

Envelope, lease Washington property, etc.
Envelope, Unsigned note, C. N. Confeld.
Receipt, $20,000. Central San Cristobal bonds.
Blank power of attorney, 2,000 share- Amer. Ice Securities Co.
Bundle E. (coupons Massey Station Mining Co.)
Paid Note, G. B. Garrison $1015, dated Sept. 1, 1911. (3 mos.) to Bank North Hempstead, Port Washington, N. Y.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20,159.

In the Matter of S. H. P. PELL & Co. et al., Bankrupts.

To Peter B. Olney, Esq., Referee in Bankruptcy:

The offer of composition herein, of which the foregoing is a copy, is hereby accepted by the undersigned creditors of S. H. P. Pell & Co, whose signatures, addresses and the amounts in which their respective claims have been filed are hereafter set out:

Dated, December —, 1914.
Signature of Creditor — Address — Amount —

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EXHIBIT 7.

Petition for Order of January 6, 1915.

United States District Court, Southern District of New York.

In Bankruptcy. No. 20,159.

In the Matter of STEPHEN H. P. PELL, HOWLAND H. PELL and Charles A. Kittle, Co-partners Doing Business under the Firm-name of S. H. P. Pell & Company, Bankrupts.

Please take notice that we will present to the Hon. Augustus N.

Hand District Judge, sitting in the District Court of the United States for the Southern District of New York at his Chambers in the Federal Building Borough of Manhattan City of New York at 2 o'clock p. m. on the 6th day of January 1915, a petition of which a copy is hereto annexed and shall then apply for the instructions of said Court and for an order duly embodying the same.

Dated New York January 6, 1915.

Yours etc.

ROBERT FORSYTH LITTLE,
Attorney for Receivers,
2 Rector Street, New York City.

75 To

David H. Miller, Esq., Attorney for Petitioning Creditors, 15 William Street, New York City.

Messrs. Wollman & Wollman, Attorneys for Logan & Bryan, 20 Broad Street, New York City.

United States District Court, Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, HOWLAND H. PELL, and Charles A. Kittle, Co-partners Doing Business under the Firm-name and Style of S. H. P. Pell & Company, Bankrupts.

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

The petition of Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield respectfully shows to this Court and alleges:

76 I. That heretofore and on August 3, 1914 a petition praying that the above named Stephen H. P. Pell, Howland H. Pell and Charles A. Kittle be adjudged bankrupts both individually and as members of the firm of S. H. P. Pell & Company was filed in the office of the Clerk of the District Court of the United States for the Southern District of New York.

II. That thereafter and on August 4, 1914, by order of this Court, your petitioners Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield were duly appointed receivers of the above mentioned alleged bankrupts and thereafter duly qualified and are now acting as such receivers. That from time to time your petitioners as such receivers have been authorized by this Court to continue the business of the bankrupts herein up to and including the present time.

III. Upon information and belief that prior to the filing of the petition in bankruptcy herein the said firm of S. H. P. Pell & Company had obtained from certain lenders hereinafter specified certain loans of money, and as security for the repayment thereof had pledged with such lenders common and preferred shares of International Nickel Company and certain shares and bonds of American

Ice Securities Company; the names of the respective lenders, the original amounts of such loans respectively and an enumeration of such shares and bonds pledged, being set forth in a schedule designated as Schedule "D" attached to a certain offer of composition dated December 21, 1914 proposed by the said bankrupts, a copy of which is hereto annexed and made a part hereof and marked Exhibit "A."

77 IV. Upon information and belief said Robert M. Thompson claims that the said shares and bonds so pledged belonged to him at the time the same were pledged but that the same were pledged by said firm of S. H. P. Pell & Company for their own debt with the knowledge and consent of said Robert M. Thompson and the said Robert M. Thompson has heretofore instituted a proceeding in this Court praying that the said securities be adjudged to be his property, subject to the liens of the respective lenders and that he be permitted to redeem any or all of the said securities from the said liens by the payment of the amounts loaned thereupon and be allowed to receive the same into his possession and control.

V. That certain of the lenders mentioned in said Schedule "D" of said Exhibit "A" have heretofore obtained orders from this Court authorizing them to sell the said securities so pledged with them respectively and all of said lenders have demanded payment of the amounts of said loans. Your petitioners are unable further to protect said securities so pledged and said securities are in danger of being sold out by such lenders which may result in deficiency claims by said lenders against the estate of S. H. P. Pell & Company.

VI. That said Robert M. Thompson claims to have been a special partner in said firm of S. H. P. Pell & Company; that certain creditors herein have alleged that said Robert M. Thompson was a general partner of said firm of S. H. P. Pell & Company at and before the time of bankruptcy and that certain of said creditors have heretofore filed in this Court intervening petitions alleging said partnership and praying that said Robert M. Thompson be ad-

78 judged a bankrupt herein; that said intervening petitions are now pending and that the time to *an* answer said petitions has not yet expired.

VII. That an offer of composition dated December 21, 1914, a copy of which is hereto annexed and made a part hereof marked Exhibit "A" has been made herein and is now pending, and that such offer of composition provides among other things for the settlement of all questions and disputes with said Robert M. Thompson and for the dismissal of said intervening petitions against said Robert M. Thompson. Your petitioners are informed and believe, and refer in that regard to the affidavit of David H. Miller hereto annexed and made a part hereof and marked Exhibit "B" that said composition has been accepted not only by said Robert M. Thompson but by creditors of the bankrupt estate whose claims aggregate an amount in excess of $2,300,000 out of a total amount of claims approximating $2,500,000 (exclusive of a claim in the amount of $2,500,000 made by said Robert M. Thompson) and referring further to said affidavit of said David H. Miller on information and belief that said composition has been accepted by a large majority in number of the creditors

whose claims have been filed herein having been accepted by upwards of 160 of said creditors out of a total number so filed of 285. That if the said composition becomes effective, by the terms thereof your petitioners will be directed to release to the said Robert M. Thompson all the right title and interest of the estate in bankruptcy of the bankrupts herein in and to said securities set forth in said Schedule "D" of Exhibit "A" as set forth in said composition agreement Exhibit "A."

79 VIII. Your petitioners have subject to the approval of the Court entered into a contract with the said Robert M. Thompson a copy of which is hereto annexed marked Exhibit "C" providing for the payment of the said loans by said Robert M. Thompson and the assignment by the petitioners of all the right and interest of the bankrupts in and to the securities pledged therefor upon the terms and conditions in said contract contained.

IX. Your petitioners are of the opinion that it is for the best interests of the bankrupt estate that such securities be assigned to said Robert M. Thompson upon his paying off the said loans under the terms and conditions of the contract hereinabove referred to.

Wherefore your petitioners respectfully pray that they may be instructed in the premises and respectfully suggest that an order be entered ratifying and approving the said contract Exhibit "C" annexed hereto and authorizing your petitioners to execute the written instruments of assignment and release therein referred to.

Dated January 6, 1915.

THEODORE H. PRICE.
ARTHUR R. MARSH.
JOSEPH M. HARTFIELD.

80 STATE OF NEW YORK,
County of New York, ss:

Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield being duly sworn each for himself deposes and says; that he is one of the petitioners above named. That he has read the foregoing petition and knows the contents thereof and that the same is true except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

THEODORE H. PRICE.
ARTHUR R. MARSH.
JOSEPH M. HARTFIELD.

Sworn to before me this 6th day of January, 1915.
[SEAL.] WILLIAM F. GERNER,
Notary Public, Kings Co. 175
Certificate Filed in N. Y. Co. 86.

EXHIBIT "A."

(Copy of composition offer hereto annexed.)

81 EXHIBIT "B."

United States District Court, Southern District of New York.

In Bankruptcy. No. 20159

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE and Howland H. Pell, Individually and as Partners Doing Business under the Firm Name of S. H. P. Pell & Co., Alleged Bankrupts.

STATE OF NEW YORK,
County of New York, ss:

David Hunter Miller being sworn deposes and says; that he is the attorney for the petitioning creditors in the above entitled matter and is familiar with all proceedings had and taken herein; that the offer of composition made by the above named bankrupts to their creditors under date of December 21, 1914, a copy of which is attached to the petition herein of Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield verified the 6th day of January 1915 as Exhibit "A" has been accepted by Robert M. Thompson the person claiming to be the owner of the securities mentioned in Schedule "D" attached to said offer of composition and has also been
82 accepted by creditors of the bankrupt estate whose claims aggregate an amount in excess of two million three hundred thousand dollars ($2,300,000) out of a total amount of claims approximately two million five hundred thousand dollars ($2,500,000) (exclusive of a claim in the amount of about two million five hundred thousand dollars ($2,500,000) made by said Robert M. Thompson). Deponent further says that the said offer of composition has also been accepted by a large majority in number of the creditors whose claims have been filed herein having been accepted by upwards of one hundred and sixty (160) of said creditors out of a total number so filed of about two hundred and eighty-five (285).

DAVID H. MILLER.

Sworn to before me this 6th day of January, 1915.
[SEAL.] WILLIAM F. GERNER,
Notary Public, Kings Co. #175.
Certificate filed in N. Y. Co. 86.

83 EXHIBIT "C."

This Agreement entered into this sixth day of January, 1915, between Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield, as receivers in bankruptcy of the firm of S. H. P. Pell & Company, hereinafter called the Receivers, parties of the First Part, and Robert M. Thompson, party of the Second Part.

Whereas the parties of the First Part on August 4, 1914, were appointed by the United States District Court for the Southern District of New York as receivers of the firm of S. H. Pell & Company bankrupts, and

Whereas an offer of composition dated December 21, 1914 has been made by the said bankrupts and is now pending by virtue of which if the same becomes effective the Receivers will be directed to release to the said Robert M. Thompson all the right, title and interest of the estate in bankruptcy of said firm of S. H. P. Pell & Company in and to certain securities mentioned and described in Schedule "D" attached to said offer of composition upon the written assumption by said Robert M. Thompson of all liability upon certain loans for the repayment of which said securities are pledged and

Whereas such loans have been called and the securities pledged therefor are in danger of being sold by the pledgees and

Whereas the said Robert M. Thompson has agreed pending the consummation of said composition to pay the said loans upon a transfer to him of the said securities and, in the event of a failure of the composition and an adjudication that said securities were
84 at the time of the filing of the petition in bankruptcy the property of said firm of S. H. P. Pell & Company and were not at said time the individual property of Robert M. Thompson, or an adjudication that said Robert M. Thompson was at said time a general partner in said bankrupt firm, to hold himself accountable for the said securities or the proceeds thereof (less the amount of present liens thereon),

Now therefore this agreement Witnesseth:

First. The Receivers shall upon the entry of an order by the United States District Court for the Southern District of New York approving their execution of these presents, forthwith execute and deliver to said Robert M. Thompson proper written instruments by which the Receivers will assign, transfer, release and quitclaim to said Robert M. Thompson all the interest which the parties of the First Part as receivers of S. H. P. Pell & Company may have or may claim to have in and to the securities described in said Schedule "D" attached to said offer of composition upon the payment and discharge by said Robert M. Thompson of the amount of the said loans and which instruments will respectively direct the said lenders to transfer and deliver to said Robert M. Thompson the said securities upon the payment and discharge of the amount of the said loans.

Second. Robert M. Thompson hereby agrees that he will within thirty (30) days pay the amounts of said loans respectively and will relieve the bankrupt estate from all possible liability on any and all loans specified in said Schedule "D" attached to said offer of composition.

85 Third. Robert M. Thompson further hereby agrees that upon receiving said securities or any of them from said lenders, if said composition shall not become effective, within six months from the date hereof and if it be adjudged that the ownership of said securities or any of them is not in said Robert M. Thompson subject to said loans, or if it be adjudged that said Robert M. Thompson was at the time of the filing of said petition in bankruptcy a general partner in said bankrupt firm said Robert M. Thompson will hold himself as a trustee for said receivers or their successors in trust for

the benefit of the estate of S. H. Pell & Company or for his individual creditors as their respective interests may be hereafter determined and for the use and benefit thereof in respect of the equities in said securities over and above the amount of the present loans thereon and will in such event account for such equities. Such equities may be accounted for either in the securities themselves or in case the said Robert M. Thompson shall have sold or disposed of the same, then in the proceeds thereof.

Said Robert M. Thompson upon the request of the receivers or in case a trustee in bankruptcy shall be appointed then upon the request of such trustee or from time to time and as often as requested, render an account as to the disposition he has made of said securities.

In the event of the confirmation of such composition the said Robert M. Thompson shall hold said securities or their proceeds in accordance with and as provided for in said composition agreement Exhibit "A."

Fourth. No person acquiring from said Robert M. Thompson the said securities so specified in Schedule "D" of said offer of
86 composition shall be required to see to the application of the purchase price thereof,

In witness whereof the parties hereto have hereunto set their hands and affixed their seals the day and year first above written.

——— ———,

——— ———,

Receivers in Bankruptcy of S. H. P. Pell & Company.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of January 1915 before me personally appeared Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield to me known and known to me to be the parties described in and who as receivers of the bankrupt firm of S. H. Pell & Company executed the foregoing contract and they severally acknowledged to me that they executed the same for the purposes therein stated.

——— ———.

STATE OF NEW YORK,
County of New York, ss:

On this 6th day of January 1915 before me personally appeared Robert M. Thompson to me known and known to me to be one of the persons described in and who executed the foregoing contract and he acknowledged to me that he executed the same for the purposes therein stated.

——— ———.

87 United States District Court, Southern District of New York.

In the Matter of STEPHEN H. P. PELL, HOWLAND H. PELL and Charles A. Kittle, Co-partners Doing Business under the Firm Name and Style of S. H. P. Pell & Company, Bankrupts.

In consideration of the receivers and the creditors of S. H. P. Pell & Company obtaining from the above Court an order under a

petition which has this day been presented to Hon. Augustus N. Hand one of the Judges of said Court with reference to the securities set forth in said petition, said Thompson hereby accepts the within offer of composition of S. H. P. Pell & Company and agrees to do everything that under the terms thereof he is required to do and agrees in every way so far as the provisions thereof concern himself, to carry out the same.

Dated, January 6, 1915.

ROBERT M. THOMPSON.

88 STATE OF NEW YORK,
County of New York,
Southern District of New York, ss.:

On this sixth day of January 1915, before me personally appeared Robert M. Thompson to me known and known to me to be the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

AUGUSTUS N. HAND,
Judge of the United States District Court.

89 EXHIBIT 8.

Order of January 6, 1915.

At a Stated Term of the District Court of the United States for the Southern District of New York held in the United States Court House in the Post Office Building, Borough of Manhattan City of New York on the 6th day of January, 1915.

Present: Honorable Augustus N. Hand, District Judge.

In Bankruptcy. No. 20,159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE and Howland H. Pell Individually and as Partners Doing Business under the Firm-name of S. H. P. Pell & Company, Bankrupts.

Upon the petition of Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield, as receivers herein, verified the 6th day of January 1915 praying for instructions and suggestions that an order be entered ratifying and approving the contract Exhibit "C," copy of which is annexed to said petition and authorizing said receivers to execute the written instruments of assignment and release in said contract referred to and upon the consent and agreement of
90 Robert M. Thompson, to the offer of composition annexed to said petition as Exhibit "A" thereto and upon all proceedings had and taken herein; and David Hunter Miller, Esq., attorney for the petitioning and other creditors and Wollman and Wollman Esqs., attorneys for Logan & Bryan and other creditors and Hawkins, Delafield and Longfellow attorneys for Gwathmey & Co. and Phelan

Beale attorney for H. Keaty & Co. et al., having appeared and consented hereto and Stover & Hall Esqs., attorneys for W. R. Craig & Co. appearing and not opposing

Now on motion of Robert Forsyth Little attorney for the receivers herein it is hereby

Ordered: That the contract bearing date January 6, 1915 entered into between Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield as receivers and Robert M. Thompson, a copy of which contract is annexed to said petition, be and the same is hereby ratified and approved and it is further

Ordered: That said Theodore H. Price, Arthur R. Marsh and Joseph M. Hartfield, are hereby instructed and directed to assign, transfer, release and quitclaim to Robert M. Thompson by proper written instruments all the interest which the said receivers or the bankrupts may have or may claim to have in and to the securities described in Schedule "D" attached to the offer of composition annexed to the petition herein as Exhibit "A" thereof upon the payment and discharge by said Robert M. Thompson of the amount of the loans to secure which said securities are pledged, which instruments shall direct the transfer and delivery to said Robert M. Thompson of the said securities upon the payment and discharge of the
91 amount of such loans and it is further

Ordered That the said receivers shall execute all further instruments and do all further acts that may be necessary to carry the said contract into full force and effect.

AUGUSTUS N. HAND,
District Judge.

We the undersigned, hereby consent to the foregoing order.

PHELAN BEALE,
Attorney for H. Keaty & Co. et al.
WOLLMAN & WOLLMAN,
Attorneys for Logan & Bryan.
DAVID MILLER,
Attorney for Petitioning Creditors.

Dated January 6, 1915.

92 EXHIBIT 9.

Order of Confirmation of Composition Agreement.

United States District Court for the Southern District of New York.

In Bankruptcy. No. 20159.

In the Matter of STEPHEN H. P. PELL, CHARLES A. KITTLE, and Howland H. Pell, Individually and as Co-partners Doing Business under the Firm-name and Style of S. H. P. Pell & Company, Bankrupts.

An application for the confirmation of the composition duly offered by the bankrupts dated December 21, 1914 having been filed in this

Court and it appearing that such composition duly filed herein has been accepted by a majority in number of all the creditors whose claims have been allowed and that such creditors represent a majority in amount of such claims and it appearing that said composition is for the best interests of the creditors and that none of the bankrupts has been guilty of any of the acts or failed to perform any of the duties which would be a bar to his or their discharge and that the offer and its acceptance are in good faith and have not been made or procured by any means, promises or acts contrary to the acts of Congress relating to bankruptcy and the consideration to be
93 paid by the bankrupts to their creditors and the money necessary to pay all debts having priority and the costs of the proceedings, having been deposited subject to the order of the Judges of this Court herein pursuant to an order entered on the 8th day of January 1915, and it further appearing that an order to show cause why such composition should not be confirmed has heretofore been made herein and due notice having been given as required by section 58*a* (2) of said bankruptcy act and on the return day of said order to show cause, to wit the 18th day of January 1915 the only creditors entering their appearance in opposition to the confirmation of said composition being J. C. White, O. G. Halliburton, C. H. Green and C. G. Kershaw, all appearing by Phelan Beale Esq., their attorney and specifications in writing of the grounds of the opposition of said creditors having been filed by said Phelan Beale Esq., on behalf of said creditors and the said objections having duly come on to be heard pursuant to stipulation and said Phelan Beale Esq., having been heard in support of said objections and after hearing Charles Pope Caldwell Esq., the attorney for said bankrupts (Albert B. Boardman Esq., of counsel) Thomas S. Fuller Esq., of counsel for Robert M. Thompson and Martin L. Stover Esq., Henry Wellman Esq., and David H. Miller Esq., of counsel for creditors; Robert Forsythe Little Esq., of counsel for the receivers herein and upon all the papers and proceedings heretofore had herein and on the proceedings had in Court on the 21st day of January 1915 including the statements made by counsel and by said receiver upon the argument and due consideration having been given thereon, and the Court being satisfied of the compliance with all of the particulars specified in said bankruptcy act,
94 Now on motion of Charles Pope Caldwell attorney for said bankrupts,

It is Ordered, Adjudged and Decreed that the said composition be and the same hereby is in all respects confirmed and the said offer of composition dated December 21, 1914 with Exhibits A, B, C, D and E annexed thereto are hereby made a part of this decree and it is further

Ordered, adjudged and Decreed that upon the filing herein by John W. Jay of the trust agreement, Exhibit "A" attached to said offer of composition, duly executed by him, the receivers herein, be and they hereby are directed to forthwith transfer and deliver to said John W. Jay all the assets and property of every name and nature of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as co-

partners doing business under the firm name and style of S. H. P. Pell & Company which are or may come into the hands or under the control of said receivers or to which they may be entitled and said receivers and the bankrupts herein shall execute and deliver to said Jay, assignments and conveyances to said Jay, of all of the assets and property of S. H. P. Pell & Company, and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as copartners doing business under the firm name and style of S. H. P. Pell & Company and of all of the right, title and interest of S. H. P. Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell individually and as copartners doing business under the firm name and stye of S. H. P. Pell & Company in and to the same. Provided however that the receivers shall retain in their possession the sum of $100,000 in money for the payment of such fees and allowances as may be made by this Court herein, as
95 hereinafter provided and for the payment of all claims against S. H. P. Pell & Company if any, which are by law entitled to priority, and the balance if any, of said $100,000 not required for such purposes, shall after such payments are made, be paid by said receivers to said John W. Jay, and provided further that such property as is the subject of reclamation proceedings shall be held by said receivers subject to and pending the determination of such reclamation proceedings and the further order of this Court and upon the termination of such reclamation proceedings respectively, any such property then remaining in the hands of the receivers and not ordered by this Court to be delivered to divers claimants shall be delivered by said receivers to said Jay.

Nothing in said composition nor in this order contained, shall be construed so as to limit or so as to enlarge or extend the rights of any party to any reclamation proceedings herein, nor shall anything in said composition or in this order contained, be construed so as to reduce or limit or so as to extend or enlarge the time within which any reclamation proceeding may be brought herein, and it is further

Ordered, Adjudged and Decreed that it is for the best interests of the estate and of the creditors thereof that the settlement with Robert M. Thompson set forth in said offer of composition and the transfer of the property to him referred to in said offer, shall be made, and the property described and set forth in schedule "E" is hereby directed to be delivered to said Robert M. Thompson and upon the said Robert M. Thompson executing and delivering to the receivers a release of any and all claims which he may have against the bankrupts, against the receivers thereof, and the estates of S. H. P.
96 Pell & Company and of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell and in all respects complying with the terms of the offer of composition on his part to be performed, and thereupon the said Robert M. Thompson, shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915 or otherwise and it is further

Ordered, Adjudged and Decreed that the distribution of the original certificates of participation in net proceeds of said assets shall be under the supervision of Peter B. Olney Esq. referee in charge of this proceeding and it is further

Ordered, Adjudged and Decreed that the said referee shall furnish to said John W. Jay trustee, a list of all the creditors entitled to receive said certificates with the amounts of the respective claims for which said certificates shall be issued which list shall be made up by the referee as follows:

(*a*) It shall include all claims duly filed with said referee on or prior to the date of this decree, to which no objections have been filed or shall be filed by any party in interest within twenty days from the date of this decree.

(*b*) It shall include all claims listed in the schedules of the bankrupts herein which have not been filed herein, and to which no objections have been or shall be duly filed by any party in interest within twenty days from the date of this decree.

(*c*) It shall contain a separate list of all claims filed herein to which objection has been or shall be duly filed by any party
97 in interest within twenty days from the date of this decree and of all scheduled claims not filed herein but to which objection has been filed within the period aforesaid.

There shall not be included in said list any scheduled claim which has been paid or discharged since the commencement of this proceeding under order of this Court or otherwise and any scheduled claim which may have been reduced in amount shall be included in said list only for the amount thereof as so reduced. The certificate of the receivers herein shall be accepted by said referee as sufficient evidence of any such payment or reduction in amount of any scheduled claim, for which no verified proof of claim has been filed.

Each creditor to whose claim objection has been or shall be filed as aforesaid within the period aforesaid shall be entitled to receive a certificate of participation for the amount at which the claim shall be finally allowed in this proceeding and in each case where the claim of the creditor is objected to only in part, such creditor shall be entitled to receive a certificate of participation for the amount of such claim which not objected to, pending and without prejudice to the final determination of the amount of the claim and to any right of such creditor to receive a further certificate upon such determination.

Any objections to claims may be brought on for hearing before the referee on three days' notice either to the claimant or by the claimant to the attorney causing the objection to be filed.

No creditor shall be entitled to receive a certificate or certificates of participation for an amount in excess of his claim against the bankrupt estate as finally determined, as hereinabove provided and objections may be filed to any claim by any party in interest.

98 It is further Ordered, Adjudged and Decreed that the bankrupts and the receivers herein are directed to execute any and all instruments that may be necessary to vest in the said John W. Jay, trustee all the right, title and interest of the said bankrupts or of the said receivers in any and all property and all claims in the possession of the receivers or to which they may be or become entitled, and it is further

Ordered, Adjudged and Decreed that the intervening petitions filed herein by Logan & Bryan and by Heineken & Vogelsang and others, shall be and they are hereby dismissed, and it is further

Ordered, Adjudged and Decreed that this Court will on the 9th day of February 1915 at 10.30 o'clock in the forenoon in the United States Post Office Building, fix the fees and allowances herein of the referee in bankruptcy, the receivers in bankruptcy, the attorneys for the receivers, the attorneys for the petitioning creditors, said intervening-petitioning creditors and the bankrupts; and it is further

Ordered, Adjudged and Decreed that the receivers the said John W. Jay, the trustee named in the said offer of composition and any party in interest herein may apply to this Court at the foot of this decree, for such other and further directions as to the Court may seem proper.

AUGUSTUS N. HAND,
U. S. District Judge.

January 25, 1915.

A true copy,
ALEX. GILCHRIST, JR.,
Clerk.

99 EXHIBIT 10.

Summons in South Carolina Action.

Court of Common Pleas, the State of South Carolina, County of Charleston.

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Copartners under the Firm-name of W. Gordon McCabe & Co., Plaintiffs,

against

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and Robert M. Thompson, Copartners under the Firm-name of S. H. P. Pell & Co., Defendants.

Copy Summons for Relief.

(Complaint Not Served.)

To the Defendants above named:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the Clerk of the Court of Common Pleas for the said County, and to serve a copy of your answer to the said Complaint on the subscribers at their office No. 30 Broad Street, Charleston, South Carolina, within twenty days after the service thereof; exclusive of the day of such service; and if you fail to answer the complaint within the time aforesaid, the plaintiff in this action will apply to the Court for the relief demanded in the complaint.

Dated March 25th, A. D. 1918.

BUIST & BUIST,
Plaintiff's Attorney-.

100 EXHIBIT 11.

Complaint in South Carolina Action.

In the Court of Common Pleas, State of South Carolina, County of Charleston.

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Copartners under the Firm-name of W. Gordon McCabe & Co., Plaintiffs,

against

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and Robert M. Thompson, Copartners under the Firm-name of S. H. P. Pell & Co., Defendants.

Complaint.

To the Court of Common Pleas for the County of Charleston, in the Ninth Circuit:

The plaintiffs allege:

1. That at all the times hereinafter set out, the plaintiffs, W. Gordon McCabe, Jr., and William F. Gray, were and now are co-partners doing business under the firm name of W. Gordon McCabe & Co., as merchants carrying on a general cotton business for export and otherwise, with their principal place of business in the
101 City of Charleston, South Carolina.

2. That at the times hereinafter set out, the defendants, Stephen, H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson, were co-partners, doing business under the firm name of S. H. P. Pell & Co., as cotton brokers, and had their principal place of business in the City of New York, in the State of New York, and at all such times were members of the New York Cotton Exchange, a New York Corporation having its principal and only place of business in New York City.

3. That prior to the 24th day of December, 1913, plaintiffs employed defendants upon open account to buy and sell upon plaintiff's orders and subject to the by-laws, rules and regulations of the New York Cotton Exchange, certain cotton for future delivery upon said exchange for the account and risk of plaintiffs, and promised and agreed to pay defendants all sums advanced by defendants in the purchase thereof, and also commissions to defendants for the purchase and sale thereof.

4. That in the course of the employment of defendants by plaintiffs aforesaid, plaintiffs sent to defendants certain orders for the purchase and sale of cotton as aforesaid, which defendants agreed and promised to execute upon the said New York Cotton Exchange. That defendants not only neglected, failed and omitted so to execute the said orders, but falsely and fraudulently stated, reported and represented to plaintiffs that the said orders had been duly executed upon the said Exchange, and in accordance with the by-laws,

102 rules and regulations thereof, and falsely and fraudulently charged plaintiffs' account with such sums as would have been advanced by defendants and with such sums as would have been earned by defendants if said orders of plaintiffs had in fact been so executed by defendants as by them falsely, and fraudulently stated, reported and represented to plaintiffs.

5. That from time to time during said period said defendants rendered to plaintiffs various statements wherein defendants falsely and fraudulently charged plaintiffs with the purchase price of about One hundred and fifty-seven thousand (157,000) bales of cotton in the amount of approximately Ten Million, One hundred and Ninety-three Thousand, Nine Hundred and Ninety Dollars, ($10,193,-990.00), and by said statements falsely and fraudulently represented to plaintiffs such cotton to have been purchased by defendants for plaintiffs' account in accordance with plaintiffs' instructions and with the by-laws, rules and regulations of the said New York Cotton Exchange, and thereby falsely and fraudulently represented to plaintiffs that the amount of the purchase price thereof had been duly paid, laid out, and expended by defendants for and on account of plaintiffs, and that the amount of defendants' commissions charged to plaintiffs in said statements had been duly earned by defendants in and about the purchase and sale of the cotton so falsely represented to plaintiffs to have been purchased for their account and to be due and owing to defendants.

6. That plaintiffs relied on said notices, statements, reports, representations and statements of account, and believed them to be true and correct, until some time after July 1st, 1916.

103 7. That relying on the truth and correctness of such notices, statements, reports, representations and statements of accounts as aforesaid, plaintiffs, at various times prior to the 31st day of January, 1914, at the request and demand of defendants, paid to defendants various sums of money aggregating Six Hundred and Three Thousand, Sixteen Dollars and Fifty-two cents ($603,016.52).

8. That large amounts of said alleged purchases and sales of cotton were not in truth or in fact made by defendants, and that the sums of money charged in said statements of account represented alleged payments made by defendants on account of said alleged purchases of cotton as aforesaid, were not in truth or in fact paid, laid out or expended by defendants in or about the purchase of such cotton, and the commissions charged to plaintiffs therein had not been earned by defendants; and that defendants at all times knew that said alleged purchases and sales had not been made, and that the said notices, statements, reports, representations and statements of account made and rendered by defendants to plaintiffs as aforesaid were false and fraudulent at the times they were severally made.

9. That said false and fraudulent notices, statements, representations, and statements of account were made, rendered and delivered to plaintiffs by defendants with the intent to deceive plaintiffs, and for the purpose of inducing plaintiffs to make the various payments to defendants mentioned in paragraph "7" hereof; that said payments were so made by plaintiffs, solely because they relied upon the said Notices, reports, statements, representations and statements of

account of the defendants and upon the truth and correctness
104 thereof, and believed that said purchases and sales had in fact been made and that said sums of money had in fact been paid, laid out and expended; and that plaintiffs continued to so believe until after July 1, 1916.

10. That in all the negotiations, transactions and communications, oral and written, had between plaintiffs and defendants, prior to July 1, 1916, plaintiffs relied upon said notices, reports, statements and representations aforesaid and believed them to be true.

11. That the defendants herein acting as such agents for plaintiffs in the purchase and sale of cotton as aforesaid, owed a duty to plaintiffs to fully and frankly disclose to plaintiffs the facts with reference to all transactions made for and on account of plaintiffs; and that defendants in violation of said duty and in violation of the trust and confidence imposed in defendants by plaintiffs falsely and fraudulently represented to plaintiffs that they had purchased and sold certain cotton and had paid out certain sums of money as hereinbefore set forth.

12. That by reason of the foregoing false and fraudulent representations and conduct of defendants as aforesaid, plaintiffs have suffered damage in the sum of One Million Dollars, ($1,000,000).

13. Plaintiffs further allege by way of special damage that said false and fraudulent notices, reports, statements, representations and statements of account to plaintiffs by the defendants showed a large indebtedness due by the plaintiffs to the defendants which was not in fact due, said false claim of said indebtedness induced plain-
105 tiffs at various times prior to December 24th, 1913, to pay large sums of cash to defendants, which were not in truth due defendants, and created a condition at the latter part of December, 1913, which if true, would have made plaintiffs unable to meet their maturing obligations; that the said conditions so created as aforesaid by defendants forced plaintiffs as a direct proximate cause, to dispose of a large part of their holdings at a loss; that their credit thereby became impaired and they were unable to meet their said obligations, and so announced, and that they were instituted on or about the 27th day of December, 1913, in the United States District Court for the Eastern District of South Carolina, proceedings in bankruptcy against said plaintiffs, and plaintiffs were compelled to make settlement by compromise with a number of their New York creditors, including defendants, the said defendants fraudulently claiming to be creditors as aforesaid, in order to escape being adjudicated bankrupts; all to the special damage to plaintiffs of Five Hundred Thousand Dollars ($500,000.00).

14. On information and belief that defendants deny liability to plaintiffs to repay said aforesaid sums of money.

Wherefore, Plaintiffs demand judgment against defendants in the sum of One Million Five Hundred Thousand Dollars, ($1,500,000.00), together with their costs herein.

BUIST & BUIST,
Plaintiffs' Attorneys.

106 STATE OF SOUTH CAROLINA,
County of Charleston, ss:

William F. Gray, being duly sworn, deposes and says: that he is one of the plaintiffs in this action; that he has read the foregoing Complaint and knows the contents thereof, and that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

WILLIAM F. GRAY.

Sworn to before me, this First day of May, A. D. 1918.
[SEAL.] JULIAN V. BRANDT,
Notary Public for S. C.

Endorsed: U. S. District Court, S. D. of N. Y. Filed Sept. 13, 1918.

107 *Notice of Appearance.*

District Court of the United States for the Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

For a Special Appearance.

Please take notice that the above-named defendants, W. Gordon McCabe, Jr., and William F. Gray, hereby appear by their attorney specially and for the sole and single purpose of objecting to the jurisdiction of this Honorable Court to entertain and proceed with this cause for any purpose whatsoever, and that each and every of the papers herein served and filed in this cause by and on behalf of the said defendants by their attorney is done under said objection to jurisdiction and protest against proceeding with this cause in any manner or form whatsoever.

Dated, New York, September 17th, 1918.

WILLIAM ST. JOHN TOZER,
Attorney for Defendants,
Appearing Specially as Above Set Forth,
42 Broadway, Borough of Manhattan,
New York City, New York.

To Myers & Goldsmith, Esqrs., Attorneys for Plaintiffs, 100 Broadway, Borough of Manhattan, New York City.

108 *Answer.*

District Court of the United States for the Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

The defendants above named, hereby reserving their objections to the jurisdiction of this court, answering the complaint herein by William St. John Tozer, their solicitor,

I. Deny upon information and belief so much of the allegations of paragraph "1" of the complaint as allege that Robert M. Thompson was the special or limited partner of the said firm of S. H. P. Pell & Co.

II. Deny so much of the allegations of paragraph "2" of said complaint as allege that said defendants are engaged in business as cotton brokers and are members of the New York Cotton Exchange, under the firm name and style of W. Gordon McCabe & Co., and transact business at No. 60 Beaver Street, in the City of New York, within the Southern District of New York; and with respect thereto defendants allege that they are cotton commission merchants engaged in business in the City of Charleston, South Carolina,
109 where they reside; that the defendant W. Gordon McCabe is a member of the New York Cotton Exchange and they have an office at 60 Beaver Street, in the City of New York, to facilitate the transaction of a part of their business.

III. Deny on information and belief so much of paragraph "3" of said complaint as alleges that S. H. P. Pell & Co. made such purchases of cotton for future delivery on the New York Cotton Exchange pursuant to such employment and thereafter and on or about the 22nd and 23rd days of December, 1913, pursuant to the defendant's direction, S. H. P. Pell & Co. sold said cotton so purchased, and the difference between the amounts paid in the purchases and commission therefore and the amount realized upon the sale thereof was the sum of $114,457.07, and with respect thereto allege on information and belief that said S. H. P. Pell & Co. did not make such purchases and sales of cotton, but falsely and fraudently represented to defendants to have done so; and defendants deny upon information and belief that any amount of money whatever was paid out by S. H. P. Pell & Co. on account of said alleged purchases.

IV. Defendants deny each and every of the allegations contained in paragraph "4" of said complaint as fully as if the same were here at length set forth and denied except they admit they paid plaintiffs the sum of $22,691.53 in January, 1914, but defendants deny that the said payment of $22,691.53 was on account of said alleged indebtedness and that after said payment there was left due and

owing to said S. H. P. Pell & Co. on January 15, 1914, a balance of $91,566.14; and defendants further deny that there was any balance or any sum due said S. H. P. Pell & Co. on said alleged in-
110 debtedness on January 15th, 1914, or at any time before or at any time thereafter and defendants allege that said payment of $22,691.53 was paid by defendants and received by said S. H. P. Pell & Co. in full settlement for all indebtedness due or alleged to be due said S. H. P. Pell & Co. from defendants and defendants further allege on information and belief that no part of said indebtedness alleged in paragraph "4" of said complaint was at any time due said S. H. P. Pell & Co. from these defendants; but that in fact said Pell & Co. was indebted to defendants in a large amount for money fraudulently obtained by said S. H. P. Pell & Co. from defendants; which latter fact was not then known to defendants and only became known to defendants subsequent to June, 1916.

V. Defendants say that they have no knowledge as to the matters alleged in paragraph "7" of the complaint.

VI. Defendants deny so much of the allegations of paragraph "9" of the complaint as alleges that the said Receivers demanded payment of a claim due from the said defendants to the bankruptcy estate amounting to the sum of $91,467.57, and deny that said Receivers at any time demanded payment of said sum or of any sum other than the sum of $261.52, which defendants admit they paid; and defendants allege that they had certain correspondence with said Receivers in which said Receivers acknowledged that said alleged claim for $91,467.57 was not a legal obligation and was not enforceable.

VII. Defendants admit that they knew of the institution of
111 bankruptcy proceedings against said S. H. P. Pell & Co.; but deny the allegations contained in paragraph "10" of the complaint that they "had full and complete knowledge and notice of the maintenance and disposition of the said bankruptcy proceedings and the orders and decrees therein made from about the time of the inception thereof down to and including the final disposition thereof and with reference thereto, defendants allege that they were scheduled by said bankrupts as a debtor and not as a creditor, and that defendants did not know that they had been defrauded by said S. H. P. Pell & Co. until June, 1916, long after the bankruptcy proceedings mentioned in the complaint.

VIII. Defendants say that they have no knowledge as to the allegations contained in paragraph "12" of the complaint; and defendants allege with reference thereto on information and belief that said Thompson claimed to be a creditor of said S. H. P. Pell & Co. in a large amount and that said Thompson was endeavoring to realize as much as possible on account of his alleged claim.

IX. Defendants allege that they have no knowledge as to the allegations contained in paragraph "13" of the complaint; and with reference thereto defendants admit that they are informed and believe that Exhibit 5 to the complaint is a copy of a portion of said schedules, that said bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell submitted a proposed offer of composition

to their creditors and that Exhibit 6 to the complaint is a copy of said offer to composition.

X. Defendants say that they have no knowledge as to the allegations contained in paragraph "14" of said complaint.

112 XI. Defendants say that they have no knowledge as to the allegations contained in paragraph "15" of the complaint.

XII. Defendants say that they have no knowledge as to the allegations contained in paragraph "16" of the complaint; but with reference thereto they admit that they are informed and believe that an order was entered confirming the offer of composition, which is Exhibit 6 to the complaint, and that Exhibit 9 to the complaint is a copy of said order.

XIV. Defendants deny each and every of the allegations contained in paragraph "21" of the complaint as fully as if said allegations were here at length set forth and denied, except that they admit that said order would have full force and effect as a discharge of provable debts against S. H. P. Pell, Charles A. Kittle and Howland H. Pell as far as it purports to be such a discharge.

XV. Defendants deny the allegations contained in paragraph "22" of the complaint that the transfer there mentioned included the claims there set forth and described in sub-divisions "1," "2" and "3" of said paragraph as fully as if said allegations were here at length set forth and denied, and defendants deny that there was any claim of any nature or any amount against them in favor of S. H. P. Pell & Co., and that none was transferred to said trustee; and defendants say that they have no knowledge as to the remaining allegations of said paragraph.

XVI. Defendants deny each and every of the allegations contained in paragraph "25" of the complaint as fully as if the same

113 were here at length set forth and denied; and with reference thereto defendants allege that the claims upon which the action mentioned in the complaint was brought against the plaintiffs were not provable in said bankruptcy proceedings.

XVII. Defendants deny so much of the allegations contained in paragraph "26" of the complaint as alleges that the action therein mentioned was based upon the transactions mentioned in paragraphs "3," "4" and "23" of the complaint, except that they admit some of said transactions are the same as those mentioned in the portion of the answer quoted in paragraph "23" of the complaint, and they further deny the allegations of said paragraph "26' that said cause of action is a "pretended cause of action."

XVIII. Defendants deny each and every allegation contained in paragraph "27" of said complaint as fully as if the same were here at length set forth and denied.

XIX. Defendants deny each and every allegation contained in paragraph "28" of said complaint as fully as if the same were here at length set forth and denied.

XX. Defendants deny each and every allegation contained in paragraph "29" of said complaint as fully as if the same were here at length set forth and denied, except defendants admit that the plaintiff, Robert M. Thompson, was the only one of the plaintiffs

herein served with process in the action in South Carolina, in said State Court, that said Thompson appeared and caused said action to be removed to the District Court of the United States for the Eastern District of South Carolina, wherein the action is now pend-
114 ing, and with reference thereto defendants allege that Robert M. Thompson, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell have all appeared and answered in said action in the said United States District Court for the Eastern District of South Carolina.

XXI. Defendants say that they have no knowledge as to the allegations contained in paragraphs "30" and "31" of the complaint.

XXII. Defendants deny each and every of the allegations contained in the second paragraph numbered "31" in said complaint, and with reference thereto, allege that the plaintiffs have a full and adequate remedy at law and have already set up in their answers in said action pending in the United States District Court for the Eastern District of South Carolina, all of the facts with reference to said Bankruptcy Proceedings; and that plaintiffs in that Court and in that action can and will obtain full justice and any and all relief to which they may be entitled either in law or in equity.

For a Separate Defense and Plea.

XXIII. Defendants here repeat and reiterate the denials contained in paragraphs I to XXII hereof inclusive as fully as if here set forth at length.

XXIV. Defendants allege that their cause of action in the action here sought to be enjoined, the complaint in which action is attached to the complaint herein as Exhibit 11, based on fraud and deceit and is of such a nature, as appears from such complaint,
115 Exhibit 11, that it would not have been a provable claim in bankruptcy had defendants known of said fraud and deceit and of the facts of said claim in time to have asserted it in the Bankruptcy Proceedings, and that the defendants did not know said facts until subsequent to June, 1916, and long after the Bankruptcy Proceedings mentioned in the complaint herein.

For a Separate Defense and Plea.

XXV. For answer in lieu of plea to the complaint defendants say that a part of the claim set up in the action now sought to be enjoined was set up by defendants in answer to an action brought in 1916 against defendants by the trustee for these plaintiffs, and not only did plaintiffs and the trustee acting for their benefit fail to seek the relief now sought; but on the contrary, the plaintiff in that action objected to the removal of that action to this Court, and caused the same to be remanded to the State Court on the ground that this Court did not have jurisdiction.

Answer in Lieu of Demurrer.

XXVI. For answer in lieu of demurrer to the complaint herein, defendants say that plaintiffs have not in or by their said complaint made or stated such a case as entitles them in a court of equity to any discovery or relief as to the matters contained in said complaint or any of such matters, and for special ground of demurrer defendants say that it appears from the plaintiffs' complaint that this Court has no jurisdiction of the parties or of the subject matter of this suit either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for, or for any relief from this Court.

116 Wherefore defendants pray that the complaint herein be dismissed and that they have judgment for their costs and disbursements herein.

WILLIAM ST. JOHN TOZER,
Solicitor for Defendants,
Office & P. O. Address, 42 *Broadway,*
Borough of Manhattan,
New York City.

STATE OF NEW YORK,
County of New York, ss.:

William St. John Tozer, being duly sworn, says that he is attorney and solicitor for the defendants herein; that he has read the foregoing answer and knows the contents thereof and that the same is true to his knowledge, except as to the matters therein stated to be upon information and belief, and that as to those matters he believes it to be true; that the reason deponent verifies this answer is that both of defendants are without the State of New York; and that the sources of deponent's information and the grounds of his belief as to matters not stated upon his knowledge are conversations had with defendants and deponent's connection as counsel for creditors with the Bankruptcy Proceedings of S. H. P. Pell & Co. as counsel for defendants in the actions mentioned in the complaint and

117 papers and documents now in possession of deponent.

WILLIAM ST. JOHN TOZER.

Sworn to and subscribed before me this 3rd day of October, 1918.
[SEAL.] J. L. LEITHEAD,
Notary Public, New York County, No. 257.
New York Register's No. 9152.

My Commission expires March 30, 1919.

118 *Notice of Motion.*

United States District Court for the Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

Please take notice that upon the complaint herein and the answer of the defendants thereto, the undersigned will move this Court on Monday, October 14th, 1918, at the opening of Court on that day or as soon thereafter as counsel can be heard for an order calling up and disposing of the issues of law raised by the separate defenses in the answer of the defendants, and for judgment on the pleadings herein dismissing the complaint on the grounds specified in paragraph "26" of said answer, and for a further order, that the trial of the issues of fact raised by said answer be adjourned until after the disposition of the issues of law raised in said answer, and for such other and further relief in the premises as may be just.

Dated, New York, October 8th, 1918.

WILLIAM ST. JOHN TOZER,
Solicitor for Defendants,
Appearing Specially, etc.,
42 *Broadway, Borough of Manhattan,*
New York City.

119 *Order Dismissing Bill.*

At a Stated Term of the District Court of the United States for the Southern District of New York, Held in the United States Courthouse, in the Post-office Building, Borough of Manhattan, City of New York, on the 23rd day of October, 1918.

Present: Honorable Learned Hand, District Judge.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

Decree.

This cause having duly come on to be heard upon a motion made by the defendants herein for judgment on the pleadings upon the grounds of demurrer set up in the answer herein, and said motion

having been duly argued by William St. John Tozer, Esq., of counsel for defendants, and Emanuel J. Myers, Esq., of counsel for plaintiffs, and due consideration having been had, it is

Ordered, adjudged and decreed: That the complaint herein be and the same hereby is dismissed, with costs to the defendants to be taxed.

LEARNED HAND,
U. S. D. J.

120 *Assignment of Errors.*

United States District Court, Southern District of New York.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

And now come the plaintiffs above named, by Myers & Goldsmith, their solicitors, and respectfully make and file the following assignment of errors in this Court, to wit:

1. The said District Court erred in ordering, adjudging and decreeing that the plaintiffs were not entitled to injunctive relief and the prayer therefor be denied.

2. The said District Court erred in ordering, adjudging and decreeing that the bill of complaint herein be dismissed, with costs to defendants.

3. The said District Court erred in holding and ruling, as indicated in and by its opinion and order and judgment, that a motion to restrain the action at law mentioned and described in the bill of complaint herein would not lie, and in granting the said motion for judgment in favor of the defendants and against the plaintiffs.

121 4. The said District Court erred in holding and ruling, as indicated in and by its opinion and order and judgment, that there were not sufficient facts set forth in the bill of complaint herein entitling the plaintiffs to relief in equity as prayed for in the bill of complaint.

5. The said District Court erred in not granting a final decree herein in favor of plaintiffs pursuant to the prayer in the bill of complaint herein, because of the insufficiency of the defenses set forth in the answer.

Dated, New York, October 24, 1918.

MYERS & GOLDSMITH,
Solicitors for Plaintiffs.

Office and Post Office Address, No. 100 Broadway, Borough of Manhattan, City of New York.

122 *Petition for Allowance of Appeal and Order.*

United States District Court, Southern District of New York.

E 15—222.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs,
against
W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

The plaintiffs above named, considering themselves aggrieved by the decree of this Court made and entered herein on the 23rd day of October, 1918, do hereby appeal from said decree and from the decision upon which the same is based to the United States Circuit Court of Appeals for the Second Circuit for the reasons set forth in the assignment of errors filed herewith, and pray that their appeal be allowed, and that a citation be issued as provided by law directed to the above-named defendants commanding them to appear before said Circuit Court of Appeals to do and receive what may pertain to justice to be done in the premises, and that a transcript of the record, proceedings, affidavits, exhibits and papers upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Second Circuit under the rules of said Court in such cases made and provided, and that said decree may be reversed by said Court of Appeals, and that the relief primarily
123 and finally prayed for in the bill of complaint herein be granted.

And your petitioners further pray that the restraining order heretofore granted in this cause by order entered on the 23rd day of September, 1918, and signed by Honorable Charles M. Hough, United States Circuit Judge, be continued in force in all respects during the pendency of the appeal herein prayed for upon such terms as the Court may deem proper.

And your petitioners offer herewith the bond required by law upon the allowance of this appeal.

Dated, October 24th, 1918.

MYERS & GOLDSMITH,
Solicitors for Plaintiffs.

EMANUEL J. MYERS,
Counsel.

And now, to wit, on the 24th day of October, 1918, on presentation and consideration of the foregoing petition, it is

Ordered, that the said appeal be allowed as prayed for upon plaintiffs giving bond as required by law in the sum of Two hundred and fifty ($250.00) Dollars, and that bond for said sum submitted by plaintiffs with said petition be and the same hereby is in all respects approved.

Dated, October 24th, 1918.

LEARNED HAND, *D. J.*

124 *Bond on Appeal Filed October 24th, 1918.*

Charles A. Kittle and others, as principals, and United States Fidelity & Guaranty Co., as surety, duly executed and filed herein on October 24th, 1918, their bond in the sum of $250, conditioned upon the prosecution by plaintiffs of their appeal, which is here omitted by consent.

Opinion of Hon. Learned Hand, D. J.

United States District Court, Southern District of New York.

STEPHEN H. P. PELL et al.

against

W. GORDON MCCABE, JR., et al.

Emanuel J. Myers, for the Plaintiffs.
William St. John Tozer, for the Defendants.

LEARNED HAND, *D. J.*:

This complicated bill of complaint raises a number of questions which I do not find it necessary to determine. For example, had the bankruptcy court any jurisdiction whatever in the order of composition to do more as to Thompson than to settle his claims against the estate? If it had such jurisdiction, did it attempt to exercise it quoad, Thompson's creditors, who did not formally accept the composition? Could a composition in any case affect the rights of creditors of Thompson, who was not a bankrupt, who offered no
125 composition and whose creditors were not before the court? If so, could it affect creditors not mentioned in the schedules, who did not know of the existence of their claims, because they had not yet discovered a fraud practised upon them by the bankrupts and Thompson? These questions all go to the effect of the order or decree of January 25, 1915, and as in the view I take that order must be pleaded in bar in South Carolina, it is obviously more orderly to avoid any discussion of them beyond the caution that my silence must not be taken as intimating that I should answer any one of them in the plaintiffs' favor. Similarly, I pass the question whether this bill is within the ancillary jurisdiction of a court of bankruptcy or of the District Court as ancillary to the court of bankruptcy.

That the bill cannot succeed as to the bankrupts is too clear to justify discussion. They got a discharge under the order of confirmation and that discharge is a bar to certain of their debts, under Section seventeen. The power of bankruptcy courts to stay suits brought against the bankrupt on dischargeable debts is regulated by section 11-*a* and is expressly confined to a period up to the determination of the discharge proceedings, Re Federal Biscuit Co., 214 Fed. R., 221, 225. By no "auxiliary" bill dependent upon the bankruptcy proceedings does the District Court get a wider power to stay

suits in a State court than it would have had as a court of bankruptcy. Indeed, I do not understand that the plaintiffs so contend. As to the bankrupts the bill must in any event be dismissed.

As to Thompson, the position, if I understand it, is this: The bankruptcy court having jurisdiction to release Thompson of his debts, undertook to do so. That release being an adjudica-
126 tion, is property, property within the jurisdiction of the court, and the court by ancillary bill will protect it from attack elsewhere by injunction. As I have said, I shall treat the order as though it effectively released Thompson from such a claim as that set up in the South Carolina action. The first question is whether a judgment releasing a debtor can be the basis of a subsequent suit to enjoin the debt. That, I take it, is at most only one form of the general question whether the plaintiff has an adequate remedy at law. I do not mean that it presents the case as strongly as where there has been a judgment upon a claim sued on and a merger, but only that it is no better for the plaintiff than such a situation. Normally, when any defense is available at law, he must plead it there (Grand Chute v. Winegar, 15 Wall., 373), and this applies as well to the defense of discharge of the liability as to any other defense (Fowler v. Palmer, 62 N. Y., 533; Saunders v. Huntington, 166 Mass., 96). The same rule generally applies when the defense is of merger or estoppel by judgment (Chicago etc. Co. v. Chicago, 143 Ill., 641, 647; Palmer v. Hayes, 93 Ind., 189; Gray v. Coan, 36 Iowa, 296; Bowen v. Gent, 54 Md., 556; B. & O. R. R. Co. v. Latimer, 118 Md., 183; Chicago etc. Co. v. St. Joseph etc. Co., 92 Fed. R. 22, 26). Now it is of course true that the right to plead in bar may not be sufficient; so much was indicated in Foltz v. St. Louis etc. R. Co., 60 Fed. R., 316, 322, where the point was not raised in time. Field v. Early, 167 Mass., 449, partook of the nature of an interpleader.

A bill quia timet is in this last category, and the plaintiffs seem to suppose that this is such, but a bill quia timet is a very limited affair. It goes to protect an existing possession which has been already established once after an attack at law and which is
127 again threatened. In such a case there is threatened such a multiplicity of suits as equity will recognize. Here there has never been any suit at all between the parties; at best the defendants are concluded by some kind of vague constructive consent, or whatever it may be. There is no property in possession of the plaintiffs, whose title has already been assailed and defended; there is no threatened repetition of any issues ever litigated before. It escapes me upon what possible theory it is supposed that bills quia timet are pertinent.

The same observations apply to those other cases cited in quantity under which courts have protected property once in their custody from becoming the subject of litigation elsewhere. It is not necessary to consider them in detail for they are endless, but they all rest upon the custody, actual or prospective, of a court. Now a release is not property, and if it were it would not under these circumstances be property of which the court has taken custody for the purpose of distribution. The mere statement of the supposed analogy shows how remote it is. Whatever rights Thompson got, were to be used like a

discharge, wherever he was sued. There is no possible reason why his supposed release should stand upon any different footing from the discharge in bankruptcy. And there is no escape from the conclusion that if this court draw to itself under the guise of an ancillary jurisdiction every litigation wherever it occurs which may be commenced against Thompson, the bankruptcy proceedings can never come to a conclusion.

Seeing no ground for equitable intervention, even if all be true that the plaintiffs allege, it follows that the bill is without equity, and as such it will be dismissed, with costs.

October 21, 1918.

LEARNED HAND, *D. J.*

128 *Opinion of Hon. Charles Merritt Hough, Circuit Judge.*

District Court of the United States for the Southern District of New York.

E 15—222.

STEPHEN H. P. PELL et al., Plaintiffs,

against

W. GORDON MCCABE, JR., and Another, Defendants.

On oral argument I did not sufficiently consider if I was aware that defendants appear only specially. Under such an appearance, which is only (strictly) permissible by leave of Court, a defendant can raise only a jurisdictional question—though if that point be overruled, he may contest the merits—having saved an exception.

As a true bill resting in diversity of citizenship the action is not sustainable. That is admitted.

As an endeavor to stay a suit against a discharged bankrupt it is also not sustainable. But as an endeavor to restrain a defendant who was party or privy to a decree in bankruptcy there is jurisdiction to entertain suit. Whether the decree or order holding in substance that Thompson was not a general partner was within the power of this Court to make, or whether properly construed, any such holding is contained in the decree, is a question which I am inclined to think defendants cannot raise under a special appearance—and which at all events has enough in it to entitle plaintiffs to a full trial.

129 Therefore, the injunction is continued in the same security, and the cause set for trial on the second Monday of October at the head of the Equity Calendar for that day, if before that time defendants appear and answer, or make such motion as may be the equivalent of a demurrer, saving their rights to the jurisdictional question sought to be raised under special appearance.

If defendants are ready to proceed to trial on the day thus fixed, and plaintiffs are not, then, unless otherwise ordered by the judge holding the Equity Session, the injunction hereby continued, granted or allowed shall immediately terminate and be no longer of effect.

If defendants are ready to proceed to trial on the day thus fixed, If defendants are not ready to proceed to trial as above indicated, the injunction will continue unless and until vacated or modified by a judge of this Court, or a judge duly authorized to hold this Court.
Sept. 19, 1918.

C. M. HOUGH,
U. S. D. J.

130 *Stipulation.*

United States District Court, Southern District of New York.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON, Plaintiffs,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants.

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties, except the opinion of Judge Hough which defendants contend is not properly a part of this record.
Dated, November 8th, 1918.

MYERS & GOLDSMITH,
Attorneys for Plaintiffs-Appellants.
W. ST. JOHN TOZER,
Attorney for Defendants-Appellees.

131 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Southern District of New York, ss.:

STEPHEN H. P. PELL and Others, Plaintiffs,

against

W. GORDON MCCABE, JR., and Another, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.
In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 9th day of November, in the year of our Lord one thousand nine hundred and eighteen, and of the Independence of the said United States the one hundred and forty-third.

ALEXANDER GILCHRIST,
Clerk.

132 United States Circuit Court of Appeals, for the Second Circuit, October Term, 1918.

No. 136.

Argued December 2, 1918. Decided January 30, 1919.

Appeal from the District Court of the United States for the Southern District of New York.

Before Ward and Rogers, Circuit Judges, and Knox, District Judge.

STEPHEN H. P. PELL, et al., Plaintiffs-Appellants.

v.

W. GORDON MCCABE, JR., and Another, Defendants-Appellees.

Myers & Goldsmith, Attorneys for Appellants;
Emanuel J. Myers, Gordon S. P. Kleeberg, Counsel.
William St. John Tozer, Solicitor for Appellees;
William St. John Tozer, of Counsel.

This case comes here on appeal from the United States District Court for the Southern District of New York.

This suit is brought by plaintiffs for the purpose of enjoining the defendants from proceeding in an action now pending in the United States District Court for the Eastern District of South Carolina so far as it proceeds against Robert M. Thompson as a general
133 partner of S. H. P. Pell and Company upon any claim which was provable in bankruptcy. It also seeks to enjoin the defendants from continuing that action in South Carolina or instituting any other action upon transactions between defendants and plaintiffs, or upon the plaintiffs' fraud in said dealings which was not at the time known to defendants. And it further seeks to enjoin defendants from attacking, questioning or challenging the power and jurisdiction of the United States District Court for the Southern District of New York to make certain orders to which reference is hereinafter made.

The South Carolina suit is for the recovery of moneys said to have been obtained from the plaintiffs by the defendants by fraud and deceit.

Neither plaintiffs nor defendants reside within the Southern District of New York.

The plaintiffs were members of the firm of S. H. P. Pell and Company, cotton brokers on the New York Cotton Exchange. The defendants are residents of South Carolina who prior to December 23, 1912, employed the brokers mentioned to buy and sell cotton on their behalf on the New York Cotton Exchange.

The plaintiffs contend that by reason of certain proceedings had in the United States District Court for the Southern District of New

York in the Bankruptcy proceedings of S. H. P. Pell and Company these defendants cannot maintain an action in South Carolina or anywhere against these plaintiffs and that they should be enjoined from doing so.

The facts with reference to those bankruptcy proceedings are as follows:

On July 31, 1914, S. H. P. Pell and Company, New York Cotton Exchange Brokers made a general assignment for the benefit of creditors.

On August 3, 1914, an involuntary petition in bankruptcy was filed by three creditors having provable claims exceeding $500 in the District Court for the Southern District of New York to have the firm of S. H. P. Pell and Company, Charles A. Kittle, and Howland H. Pell, individually, composing the said firm, adjudicated involuntary bankrupts. Robert M. Thompson was not made a party by
134 that petition. S. H. P. Pell and Company was, however, a limited partnership formed under the laws of the State of New York. The firm consisted of the two Pells above named and Kittle as general partners, and Robert M. Thompson as a special partner.

Receivers in bankruptcy were appointed who immediately qualified. When they took possession of the assets of the firm they found among them a large amount of securities and stocks which were claimed to be the individual property of Robert M. Thompson.

On October 2, 1914, the alleged bankrupts filed schedules in which was set forth the indebtedness of S. H. P. Pell and Company to Robert M. Thompson in the sum of $3,373,082.30, and that defendants were debtors in the sum of $261.52.

On October 19th of the same year the receivers of S. H. P. Pell and Company notified the defendants that they were scheduled as debtors in the schedules filed in the Bankruptcy Court for the sum of $261.52, and on the same day further demanded payment from the defendants of a claim for $91,467.57 in favor of the bankrupts. Pell and Company had, prior to December, 1913, acted as cotton brokers on the New York Cotton Exchange and claimed that the defendants owed them $91,467.57 and $261.52.

On November 21, of the year aforesaid, the defendants remitted to the receivers the sum of $261.52 being the amount previously demanded.

And on November 23 and 28 of that year petitions were filed in the bankruptcy proceedings which prayed that Robert M. Thompson be made a party to those proceedings and adjudicated a general partner and a bankrupt.

Negotiations were had at this time between the bankruptcy receivers, the New York Cotton Exchange, Robert M. Thompson and the bankrupts (firm and individuals) for:

"(1) The adjustment and settlement of the claims of the New York Cotton Exchange creditors, aggregating over $2,000,000.
135 (2) The threatened sale of certain securities loaned by Robert M. Thompson to the bankrupt firm and large deficiency and the assumption by Robert M. Thompson of certain firm

liabilities aggregating $2,100,000 and his agreement to hold the bankrupt estate harmless.

(3) The withdrawal of the scheduled claim of Robert M. Thompson against the bankrupt estate for $3,373,082.50, and the release of the bankrupt estate therefrom.

(4) The settlement of all questions and disputes with release and discharge of Robert M. Thompson and the dismissal of the intervening petitions against Robert M. Thompson."

The result was a plan of settlement in pursuance of which the bankrupts made an offer of compromise and composition which contained the following provisions concerning Robert M. Thompson:

"First. This offer is made in consideration of the discharge of the bankrupts, Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, from their debts, both individual and partnership, and of the release of Robert M. Thompson from any and all liability to said S. H. P. Pell & Co., and from any and all liability to any creditor of S. H. P. Pell & Co.

Ninth. Each and every creditor of S. H. P. Pell & Co. who shall assent to this offer of composition shall, upon the final confirmation of such composition by the Court, be deemed conclusively by his said assent thereto to have released Robert M. Thompson of and from any and all liability to such creditor on account of any connection of said Robert M. Thompson with S. H. P. Pell & Co. or any transaction of said Robert M. Thompson by or through S. H. P. Pell & Co.

136 Twelfth. It shall be adjudged herein * * *. There be no liability to said Thompson on the part of the Estate of S. H. P. Pell & Co. by reason of any rights or claims of any person * * * *

Fourteenth. The intervening petitions herein of Logan and Bryan and of Heineken and Vogelsang, et al., shall be dismissed, without costs."

The intervening petitions above referred to which were to be dismissed were those asking to have Thompson declared a general partner of S. H. P. Pell & Co. and adjudicated a bankrupt.

The Bankruptcy Court by formal order on January 25, 1915, confirmed the proposed compromise and offer of composition which had previously received the consent in writing of more than a majority in number and ninety per cent in amount of the creditors.

It is not denied that Robert M. Thompson duly carried out and performed all the terms of the agreement of compromise and the order of confirmation of January 25, 1915. And thereafter and in accordance with the order of confirmation aforesaid the bankrupts and the bankruptcy receivers conveyed all the bankrupt estate to John W. Jay who thereafter duly transferred it to the Guaranty Trust Company as substituted trustee for the bankrupt estate.

On June 16, 1916, the Guaranty Trust Company began an action in the United States District Court for the Southern District of New York against the defendants herein to recover the sum of $91,467.57, alleged to be due from defendants to the firm of S. H. P. Pell & Co., on account of transactions conducted by that firm on the New York Exchange as the defendants' brokers.

On March 29, 1918, the defendants began an action in the Court of Common Pleas for the County of Charleston in the State of South Carolina, wherein the defendants resided, against the firm of S. H. P. Pell & Co., alleged to be formed of Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson to recover
137 $1,500,000 damages for fraud perpetrated in and arising out of transactions had by the defendants with S. H. P. Pell & Co., while that firm was acting as their brokers in transactions on the New York Cotton Exchange. The liability of Robert M. Thompson in said action is placed on the ground of his being a general partner.

Robert M. Thompson, one of the plaintiffs herein, and who was the only defendant served with process in the South Carolina action, caused the action to be removed from the State Court into the United States District Court wherein it was understood to be pending when this case was argued in this court, and wherein so far as we are informed it is still pending.

In the suit, now under review in this court, the court below dismissed the bill.

ROGERS, *Circuit Judge* (after stating the above facts):

Inasmuch as it appears that neither the plaintiffs nor the defendants reside within the Southern District of New York the court below clearly was without jurisdiction of the suit, now under review, as an original action. But it is said that this suit is not brought as an original suit but as a dependent and ancillary suit which has direct reference to a matter already litigated in the bankruptcy proceedings in the District Court for the Southern District of New York relating to the firm of S. H. P. Pell & Co. and the several persons alleged to constitute that firm.

In Street's Federal Equity Practice, vol. 2, sec. 1229, that writer says: "It is a rule, subject to but one exception, that jurisdiction in an ancillary proceeding is supported by the jurisdiction of the court in the main, or principal cause. Hence the ordinary jurisdictional averments may be dispensed with in such a proceeding. If a court has jurisdiction of the principal suit, it also has jurisdiction of any ancillary proceeding in that suit. Neither the citizenship of the parties, nor the amount in controversy, nor any other factor that would ordinarily determine jurisdiction, has any bearing on the right of the court to entertain that proceeding."
138 The one exception above referred to relates to an ancillary receivership and with that we are not now concerned. The right of a Federal court to sustain jurisdiction of an ancillary suit without reference to the citizenship of the parties was fully considered in Krippendorf v. Hyde, 110 U. S., 276, which reviewed the authorities. And see Pacific Railroad of Missouri v. Missouri Pacific Railway Co., 111 U. S., 505; Johnson v. Christian, 125 U. S., 642, 645; Carey v. Houston & Texas Central Ry. Co., 161 U. S., 115; Eichel v. United States Fidelity & Guaranty Co., 245 U. S., 102, 104.

The jurisdiction of a court over a particular subject matter and that court's power to apply a remedy no doubt are co-extensive. So that demands which are ancillary to the main action may be taken

cognizance of by the court and determined in aid of its authority over the principal matter. And a court may entertain proceedings ancillary to its judgment or decree for the jurisdiction it originally acquired is not exhausted by the entry of the judgment and the power is still in the court to issue all proper process and take all proper proceedings for the enforcement of its judgment. All this is familiar doctrine and well established law.

An ancillary suit may be maintained:

1. To aid, enjoin or regulate the original suit.
2. To restrain, avoid, explain or enforce the judgment or decree entered in the original suit.
3. To enforce or adjudicate liens or claims to property in the custody of the court in the original suit.
4. To prevent the relitigation in other courts of the issues heard and adjudged in the original suit, and to protect the titles and rights acquired under its judgment or decree from attack based on the theory that the adjudication in the original suit was illegal or ineffective.

139 Riversale Cotton Mills v. Alabama & Georgia Manuf. Company, 198 U. S., 188; Julian v. Central Trust Co., 193 U. S., 93, 112, 113; Carey v. Houston & Texas Ry. Co., 161 U. S., 115, 126, 127; St. Louis & San Francisco Ry. Co. v. M'Elvain, 253 Fed., 123, 128. In Bates on Federal Equity Procedure, vol. 1, sec. 97, the doctrine is summarized as follows:

"A bill filed to continue a former litigation in the same court, or which relates to some matter already partly litigated in the same court, or which is an addition to a former litigation in the same court, by the same parties or their representatives standing in the same interest, or to obtain and secure the fruits, benefits and advantages of the proceedings and judgment in a former suit in the same court by the same or additional parties, standing in the same interest, or to prevent a party from using the proceedings and judgment of the same court for fraudulent purposes or to restrain a party from using a judgment to perpetrate an injustice, or obtain an inequitable advantage over other parties to the former judgment or proceeding, or to obtain any equitable relief in regard to, or connected with, or growing out of, any judgment or proceeding at law rendered in the same court, or to assert any claim, right or title to property in the custody of the court, or for the defense of any property rights, or the collection of assets of any estate being administered by the court, is an ancillary suit."

We do not question but that the District Court for the Southern District of New York may enforce and protect its jurisdiction as a Court of Bankruptcy when appealed to by a supplementary or ancillary bill to enforce its orders, sustain its jurisdiction and protect parties in the enjoyment of rights secured to them under its orders. This is so not only where jurisdiction is reserved or still retained but even afterwards where the result would be a relitigation of the same subject matter between the same parties. In re Swofford, 130 Fed., 949.

But the difficulty with the maintenance of this suit is that it cannot be regarded as in any proper sense an ancillary suit. It was instituted upon the theory that the proceedings in the District
140 Court for the Southern District of New York in the bankruptcy matter of S. H. P. Pell, & Co. discharged Stephen H. P. Pell & Co. as a firm and Stephen H. Pell, Charles A. Kittle and Howland H. Pell individually from all claims against the firm of S. H. P. Pell & Co., but that it also discharged therefrom Robert M. Thompson. But this is to lose sight of the terms of the composition which provided for the release of Thompson "from any and all liability to any creditor of S. H. P. Pell & Co. who shall assent hereto, on account of any connection of said Robert M. Thompson with said firm or any transaction of said Robert M. Thompson by or through said firm."

The release of Thompson was to apply only to those who specifically assented thereto. And there is no allegation anywhere in the complaint in the present action that the defendants herein assented to the composition. An examination of the record of the former proceedings shows that Thompson was not adjudicated a bankrupt, never filed schedules and never made any offer of composition. The offer of composition was an offer made by the two Pells and Kittle. Moreover, Thompson could not have offered a composition as section 12 of the Bankruptcy Act expressly provides that a bankrupt shall not offer terms of composition "before he has been examined in open court or at a meeting of his creditors, and has filed in court the schedule of his property and lists of his creditors, required to be filed by bankrupts * * *."

An examination of the offer of composition made by the Pells and Kittle, and of the order confirming the same discloses that in neither is any reference made to the question whether Thompson was a member of the firm of S. H. P. Pell & Co. as a general or special partner. There was no adjudication of that question in that proceeding. There was no adjudication in that proceeding on the subject matter involved in the South Carolina action. And if the defendants here had appeared in that proceeding and opposed the composition, which they did not, they could not be enjoined from suing in another court. Friend v. Talcott, 228 U. S., 27. In the case cited the court holds that a creditor who had unsuccessfully opposed
141 a composition and a discharge in bankruptcy on the ground of fraud in creating the debt and accepted a dividend and who then sued for the balance on the ground that the debt was excepted from the discharge had not waived his right to sue on the tort by accepting the dividend. And the court also held that the granting of the discharge was not res judicata of the claim for the balance of the debt.

In the instant case the defendants who have brought the South Carolina action deny that they knew of the existence of their claims until long after the bankruptcy proceedings. Their allegation is that they did not know that they had been defrauded by S. H. P. Pell & Company until some time after July 1, 1916. The order of

confirmation of the composition agreement was entered on January 25, 1915. The allegations of fraud contained in the complaint in the South Carolina action may be found in the margin.[1]

The South Carolina action is based on fraud and deceit and is of such a nature that the tort claim it asserts was not provable in bankruptcy even if the plaintiffs in that action had known of the facts of the claim in time to have asserted them in the bankruptcy proceedings. Whether the tort might have been waived and a provable claim in bankruptcy made based on an implied contract if the
142 facts had been known we need not consider as the allegation is that the facts were not known and if not known no such course could have been adopted. And sec. 17 of the Bankruptcy Act declares that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud * * * while acting * * * in any fiduciary capacity." And the fraud complained of was committed, it is alleged, while the defendants in the South Carolina action were employed by the plaintiffs in that action as cotton brokers to buy and sell cotton for the account and risk of the plaintiffs, and such fraud was in connection therewith.

The bill of complaint in the present suit is exceedingly complicated, and raises a number of questions which the court below did not find it necessary to determine, and which we do not find it necessary to determine. The court below found in the bill no ground for equitable intervention even if all the allegations the bill contains be assumed as true. We are in full agreement with that court in believing that the bill is without equity. It was properly dismissed, and being dismissed for want of jurisdiction the decree is to be modified to provide that the dismissal is without prejudice.

Decree as modified is affirmed.

Judge Ward was present at the argument and participated in the subsequent discussion of the case and concurred in the result. He has not read this opinion being temporarily absent from the country at the time it was prepared and filed.

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[1] "That in the course of the employment of defendants by plaintiffs aforesaid, plaintiffs sent to defendants certain orders for the purchase and sale of cotton as aforesaid, which defendants agreed and promised to execute upon the said New York Cotton Exchange. That defendants not only neglected, failed and omitted so to execute the said orders, but falsely and fraudulently stated, reported and represented to plaintiffs that the said orders had been duly executed upon the said Exchange, and in accordance with the by-laws, rules and regulations thereof, and falsely and fraudulently charged plaintiffs' account with such sums as would have been advanced by defendants and with such sums as would have been earned by defendants if said orders of plaintiffs had in fact been so executed by defendants as by them falsely, and fraudulently stated, reported and represented to plaintiffs.

"That from time to time during said period said defendants rendered to plaintiffs various statements wherein defendants falsely and

143 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, held at the Court-rooms in the Post-office Building in the City of New York, on the 9th day of February, one thousand nine hundred and nineteen.

Present:

Hon. Henry G. Ward, Hon. Henry Wade Rogers, Circuit Judges; Hon. John C. Knox, District Judge.

STEPHEN H. P. PELL et al., Plaintiffs-Appellants,
v.
W. GORDON MCCABE, JR., and Another, Defendants-Appellees.

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is modified in accordance with the opinion of this court and as so modified is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

H. W. R.
J. C. K.

144 Endorsed: United States Circuit Court of Appeals, Second Circuit. S. H. P. Pell et al., v. W. G. McCabe. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Feb. 10, 1919. William Parkin, Clerk.

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fraudulently charged plaintiffs with the purchase price of about one hundred and fifty-seven thousand (157,000) bales of cotton in the amount of approximately Ten Million, One hundred and Ninety-three Thousand, Nine Hundred and Ninety Dollars ($10,193,-990.00), and by said statements falsely and fraudulently represented to plaintiffs such cotton to have been purchased by defendants for plaintiffs' account in accordance with plaintiffs' instructions and with the by-laws, rules and regulations of the said New York Cotton Exchange, and thereby falsely and fraudulently represented to plaintiffs that the amount of the purchase price thereof had been duly paid, laid out, and expended by defendants for and on account of plaintiffs, and that the amount of defendants' commissions charged to plaintiffs in said statements had been duly earned by defendants in and about the purchase and sale of the cotton so falsely represented to plaintiffs to have been purchased for their account and to be due and owing to defendants."

145 In the United States Circuit Court of Appeals for the Second Circuit, October Term.

In Equity. No. 136.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Appellants,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Appellees.

To the Honorable Henry Galbraith Ward, Senior Circuit Judge, and the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

Come now Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, plaintiffs in the above entitled action in the United States District Court for the Southern District of New York, and appellants in the said Circuit Court of Appeals of the United States for the Second Circuit, by their solicitors, Messrs. Emanuel J. Myers, Samuel J. Goldsmith and Gordon S. P. Kleeberg, and complain that in the record and proceedings and also in
146 the rendition of the decree or judgment of the United States Circuit Court of Appeals for the Second Circuit, sitting at the City of New York, in the State of New York, within the Southern District of New York, in the above entitled and numbered cause, on the 10th day of February A. D. 1919, modifying the judgment and decree of the United States District Court for the Southern District of New York and dismissing the suit solely for want of jurisdiction in said cause, manifest error has intervened to the great injury and damage of these petitioners; that the jurisdiction of the District Court of the United States for the Southern District of New York, in said cause, depended upon the following matters and things alleged in the Bill of Complaint in this suit, to wit:

The appellants as plaintiffs contend that by reason of certain proceedings had in and orders and decrees of the United States District Court for the Southern District of New York, in the bankruptcy proceedings of S. H. P. Pell & Co. therein maintained, these defendants and appellees cannot maintain an action as plaintiffs in South Carolina or anywhere against these plaintiffs as defendants therein, and that they (defendants and appellees) should be enjoined from so doing.

147 S. H. P. Pell & Co., a firm, were New York Cotton Exchange brokers against whom on August 3, 1914, an involuntary petition in bankruptcy was duly filed in the District Court of the United States for the Southern District of New York on the bankruptcy side of that Court, to have that firm and Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, as individually alleged to compose that firm, adjudicated involuntary bankrupts.

Subsequently on November 23rd and 28th 1914, petitions were duly filed in the said bankruptcy proceedings in said District Court which prayed that Robert M. Thompson be made a party to those

proceedings and be adjudicated a general partner and an involuntary bankrupt.

On November 25, 1915, the firm of S. H. P. Pell & Co. and Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell were adjudicated involuntary bankrupts.

Negotiations were had in said bankruptcy proceedings between the bankruptcy receivers (appointed by said District Court), the bankrupts, certain New York Cotton Exchange creditors and Robert M. Thompson subsequent to November 25, 1915, for the adjustment and settlement of the claims of the New York Cotton Exchange
148 creditors whose scheduled claims aggregated over $2,000,000; the withdrawal by Robert M. Thompson of the scheduled claim in his behalf against the bankrupt estate for $3,373,082.30, the release of the bankrupt estate therefrom, and divers other matters, and the settlement of all questions and disputes with and the release and discharge of Robert M. Thompson and the withdrawal of the said petitions against the said Robert M. Thompson.

A decree was duly entered in said bankruptcy proceedings on January 25, 1915, in which it was inter alia adjudged that it was for the best interests of the bankrupt estate that the matters in controversy with Robert M. Thompson be settled, and that Robert M. Thompson shall be relieved from any liability to the said receivers or to the bankrupt estate, and that the petitions and proceedings against said Robert M. Thompson be dismissed.

On September 13, 1918, in the District Court of the United States for the Southern District of New York, the appellants as plaintiffs, filed their bill of complaint invoking the exercise of ancillary jurisdiction against the defendants, wherein they allege in sub-
149 stance that the defendants in disregard of a compromise and settlement of a controversy between Robert M. Thompson and the Receivers in Bankruptcy of the firm of S. H. P. Pell & Co., approved by the United States District Court for the Southern District of New York in said Bankruptcy proceedings, and in disregard and violation of the said orders and decrees settling said controversy, and of a compromise agreement confirming the same, had instituted and were carrying on a suit against the plaintiffs in a Court of the State of South Carolina, wherein and whereby the defendants as plaintiffs in said suit, sought to relitigate a matter already determined in the Bankruptcy Court, and to assert a liability against the plaintiffs, which had been duly determined, compromised and released in the said bankruptcy proceedings.

The bill showed by its exhibits, referred to therein and made a part thereof, that in the said bankruptcy proceedings a dispute arose as to the rights and obligations of Robert M. Thompson, who claimed therein to be a special and not a general partner of the bankrupt firm of S. H. P. Pell & Co., and that the dispute was compromised and settled by an agreement between said Robert M. Thompson and the Receivers, which was ratified by the Bankruptcy Court by its orders and decrees entered on January 6, 1915, and January 25, 1915.

150 By their said bill, the appellants as plaintiffs sought perpetually to enjoin and restrain the appellees as defendants,

from taking any further steps or proceedings in their South Carolina action, which shall proceed on the ground that Robert M. Thompson is liable as a general partner of the firm of S. H. P. Pell & Co. composed of Stephen H. P. Pell, Charles A. Kittle and Howland H. Pell, as general partners, and Robert M. Thompson, as special partner, in respect to any claim which was provable in the bankruptcy proceedings or otherwise, and perpetually to enjoin the defendants from maintaining and continuing the said action in the said Court of South Carolina, and from instituting any other action founded upon the transactions set forth in the bill of complaint therein; and to perpetually enjoin the defendants from attacking the power and jurisdiction of the District Court of the United States for the Southern District of New York in bankruptcy to make and enter the orders and decree under which, by said bill, the appellants contended that certain rights and protection had been secured to them, and especially to Robert M. Thompson;

And for an interlocutory injunction and other proper relief.

151 The jurisdiction of the said District Court in and for the Southern District of New York was not invoked on the ground of diversity of citizenship, but upon the ground that by reason of the said orders and decrees and other proceedings in the said bankruptcy court, the said District Court had jurisdiction to protect the appellants, and especially the said Robert M. Thompson, in all of the rights which he and they had secured in virtue of the said proceedings in and orders and decrees of said Bankruptcy Court.

Thereafter in said suit the defendants, appellees, claiming to reserve their objections to the jurisdiction of the District Court, answered the bill of complaint herein, and among other things, in lieu of demurrer, denied that the bill of complaint made a case entitling the plaintiffs to relief in a court of equity, and for special ground of demurrer alleged:

"That it appears from the plaintiffs' complaint that this court has no jurisdiction of the parties or of the subject matter of this suit, either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for or for any relief from this court."

152 After argument upon the issue of law thus presented the learned District Court dismissed the bill of complaint and passing over the questions of jurisdiction, determined that the bill was without equity.

Thereupon the plaintiffs-appellants appealed to the United States Circuit Court of Appeals for the Second Circuit, and after argument in the Circuit Court of Appeals the judgment or decree of dismissal of the District Court was modified by this Honorable Court so as to provide that the bill of complaint was dismissed for want of jurisdiction, and that the dismissal was without prejudice, and as so modified was the judgment or decree affirmed by the Circuit Court of Appeals for the Second Circuit.

That the amount involved in said suit and the matter in controversy exceeds the sum of $3,000 besides costs and interest, and is not

a case in which the jurisdiction of the Circuit Court of Appeals for the Second Circuit is made final.

An assignment of errors is filed herewith.

Wherefore your petitioners pray for the allowance of this appeal to the end that the cause may be carried to and heard by the Supreme Court of the United States.

Petitioners pray for such other and further process as is
153 or may be required to perfect the appeal prayed for to the end that the error therein may be corrected.

EMANUEL J. MYERS,
SAMUEL J. GOLDSMITH,
GORDON S. P. KLEEBERG,
Solicitors for said Petitioners,
100 *Broadway, Borough of Manhattan,*
City of New York.

154 The appeal prayed for in the foregoing petition is hereby allowed, and it is ordered that the petitioners-appellants give a bond in the sum of $1,000 conditioned as the law directs, this 10th day of March, A. D. 1919.

MANTON,
Circuit Judge of the United States
in and for the Second Circuit.

155 In the United States Circuit Court of Appeals for the Second Circuit, October Term.

In Equity. No. 136.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs-Appellants,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants-Appellees.

Assignment of Errors.

Come now Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, appellants and plaintiffs herein, and file the following assignment of errors, and complain and specify that in the following respects, and each and every of them, the decision and judgment of the above named Honorable Circuit Court of Appeals is erroneous and unjust to them:

First. Because the Circuit Court of Appeals held that the District Court of the United States for the Southern District of New York was without jurisdiction to take cognizance of, entertain and proceed with the cause upon the case made and presented by the bill of complaint.

155½ Second. Because the Circuit Court of Appeals erred in not holding and determining that the District Court had

jurisdiction of the said bill of complaint in the exercise of its general equity powers as ancillary to the jurisdiction which was invoked and had been exercised by the District Court in proceedings in bankruptcy.

Third. Because the Circuit Court of Appeals erred in not holding and determining that the District Court of the United States for the Southern District of New York had jurisdiction to take cognizance of, entertain and proceed with the cause and grant the relief and protection which should have been and was thereby secured by the orders and decrees of the Bankruptcy Court to the plaintiffs-appellants, which the defendants-appellees vexatiously sought to re-litigate, overthrow or disregard.

Fourth. Because the Circuit Court of Appeals erred in erroneously misconstruing and failing to give adequate relief for the scope and effect of the said proceedings in and orders and decrees of the court of bankruptcy and the protection which should have been and was thereby secured to the appellants-plaintiffs, and especially
156 Robert M. Thompson, one of the appellants-plaintiffs.

Fifth. Because the Circuit Court of Appeals erred in not holding that in the exercise of the ancillary jurisdiction in equity of the said District Court the said bill of complaint should have been retained and a trial of the issues of fact raised by the pleadings in the said cause proceeded with upon the merits thereof.

Sixth. In that the Honorable Circuit Court of Appeals should have ordered the reversal of the judgment and decree of the District Court rendered in the said cause, and thereupon remanded the said cause with instructions to proceed with the trial thereof.

Wherefore, these parties pray that the said decree of the Honorable Circuit Court of Appeals be reversed and the judgment of the said Honorable District Court be likewise in all things reversed, and that such other orders and decrees in the premises be made as shall effect a reversal of the said decrees and secure to these parties plaintiffs-appellants their costs and all further relief to which in equity they may be entitled.

EMANUEL J. MYERS,
SAMUEL J. GOLDSMITH,
GORDON S. P. KLEEBERG,
Attorneys and Solicitors for Plaintiffs-Appellants.

157 (Endorsed:) United States Circuit Court Appeals for the Second Circuit. Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, Appellants, against W. Gordon McCabe, Jr., and William F. Gray, Appellees. Copy. Petition for Allowance of Appeal and Assignment of Errors. Myers & Goldsmith, Attorneys for Appellants, 100 Broadway, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Mch. 10, 1919. Wm. Parkin, Clerk.

158 Know all men by these presents, That We, Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson, as Principals, and the United States Fidelity and Guaranty Company, having an office and usual place of business at No.

47 Cedar Street, Borough of Manhattan, City of New York, as Surety are held and firmly bound unto W. Gordon McCabe, Jr. and William S. Gray, in the full and just sum of One Thousand ($1,000.00) Dollars, to be paid to the said W. Gordon McCabe, Jr. and William S. Gray, their certain attorneys, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 10th day of March, 1919.

Whereas, at a term of the United States Circuit Court of Appeals for the Second Circuit, in a suit pending in said Court, between the said Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, Appellants and W. Gordon McCabe, Jr. and William S. Gray, Appellee, an order was made on the 10th day of February, 1919, modifying the judgment and decree of the District Court of the United States, Southern District of New York, dismissing the plaintiffs' bill herein and the said Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson having obtained an order allowing an appeal to the Supreme Court of the United States and filed a copy thereof in the Clerk's office of the Circuit Court of Appeals, Second Circuit; and having obtained a citation directed to the said defendants citing and admonishing them to be and appear at a Supreme Court of the United States, at Washington on the 9th day of April, 1919.

159 Now, the condition of the above obligation is such That if the said Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson shall prosecute their appeal to effect and answer all costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

STEPHEN H. P. PELL. [L. S.]
CHARLES A. KITTLE. [L. S.]
HOWLAND H. PELL. [L. S.]
ROBERT M. THOMPSON. [L. S.]
S. J. GOLDSMITH, *Att'y.*
UNITED STATES FIDELITY AND GUARANTY CO.,
By S. FRANK HEDGES,
Attorney-in-Fact.

Sealed and delivered in the presence of

——— ———.

Attest:

WILLIAM H. EASTWICK,
Attorney-in-Fact.

160 *Affidavit. Acknowledgment and Justification by the United States Fidelity and Guaranty Company.*

[Motto:] Fidelity, Contract, Judicial, Casualty.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came S. Frank Hedges, known to me to be attorney-in-fact of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the attorney-in-fact of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the provisions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson is the corporate seal of the said United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as such attorney-in-fact of said Company; and that he is acquainted with William H. Estwick and knows him to be Attorney-in-fact of said Company; and that the signature of said William H. Estwick subscribed to said bond is the genuine handwriting of said William H. Estwick and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceed its claims, debts and liabilities, of every nature whatsoever, by more than the sum of two million dollars ($2,000,000.00).

S. FRANK HEDGES.

Sworn to, acknowledged before me, and subscribed in my presence this 10th day of March, 1919.

AUGUSTUS WALLAUER,
Notary Public, Queens County, No. 1988.

Certificates filed in New York County No. 309, Register's No. 9283; Kings County No. 97, Register's No. 9101; Bronx County No. 18, Register's No. 948; Richmond, Westchester, Nassau, Putnam, Orange and Suffolk Counties. Term Expires March 30th, 1919.

161 (Endorsed:) County Clerk's File No. —. Stephen H. P. Pell, Charles A. Kittel, Howland H. Pell and Robert M. Thompson, Principals, United States Fidelity and Guaranty Company, Surety, to W. Gordon McCabe, Jr., & William S. Gray. Bond

for Costs on Appeal. The within undertaking is approved as to form and as to the sufficiency of the surety. N. Y., March 10, 1919. Martin T. Manton. United States Fidelity and Guaranty Co., 47 Cedar Street, New York City, Surety. United States Circuit Court of Appeals, Second Circuit. Filed Mch. 10, 1919. William Parkin, Clerk.

162 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 161 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Stephen H. P. Pell et al. against W. Gordon McCabe and another, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of March in the year of our Lord One Thousand Nine Hundred and nineteen and of the Independence of the said United States the One Hundred and forty-third.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
Clerk.

163 *Citation on Appeal to Supreme Court.*

In the United States Circuit Court of Appeals for the Second Circuit, October Term.

In Equity. No. 136.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL, and ROBERT M. THOMPSON, Plaintiffs-Appellants,

against

W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Defendants-Appellees.

The President of the United States to W. Gordon McCabe, Jr., and William F. Gray, Greeting:

You are hereby cited and admonished to appear in the United States Supreme Court in the City of Washington in the District of Columbia on the 9th day of April, 1919, pursuant to the appeal duly obtained and filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein you, as defendants, are appellees, and Stephen H. P. Pell, Charles A. Kittle, How-
164 land H. Pell and Robert M. Thompson, as complainants, are the appellants, to show cause, if any there be, why the judgment and decree in said appeal mentioned should not be reversed and

corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Martin T. Manton, United States Circuit Judge, in and for the Second Circuit, on the 10th day of March in the year of our Lord One thousand nine hundred and nineteen.

MANTON,
U. S. Circuit Judge.

165 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, Plaintiff Appellants, against W. Gordon McCabe, Jr., and William F. Gray, Defendant Appellees. Original. Citation. Myers & Goldsmith, Attorneys for Plaintiff Appellants, 100 Broadway, Borough of Manhattan, New York City. Copy received this 10th day of March, 1919. Wm. St. John Tozer, Att'y D'f't Appellees.

Endorsed on cover: File No. 27,031. U. S. Circuit Court of Appeals, 2d Circuit. Term No. 945. Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell, and Robert M. Thompson, appellants, vs. W. Gordon McCabe, Jr., and William F. Gray. Filed March 29th, 1919. File No. 27,031.

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Supreme Court of the United States

OCTOBER TERM, 1919.

No. 335.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Appellants,

vs.

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR APPELLANTS.

I.

Statement of the Case.

The plaintiffs in the suit appeal (*Petition, Transcript of Record, p. 78; Allowance, p. 81) to this Court from an adverse decision of the Circuit Court of Appeals for the Second Circuit, which modified (Mandate, p. 77), by dismissing the bill without prejudice (Opinion, p. 76), a decree of the District Court (p. 63) dismissing the plaintiff's bill of complaint, and which affirmed the decree of dismissal as so modified (Mandate, p. 77).

*All references are to printed pages of the Transcript of Record, and all italics, unless otherwise noted, are our own.

It being perhaps uncertain whether the review in this Court should be by appeal or certiorari, the plaintiffs secured the allowance of an appeal and brought the record into this Court (Petition, p. 78; Allowance, p. 81; Assignment of Errors, p. 81; Bond, p. 82; Citation, p. 85; Service, p. 86).

But this Court has also granted a writ of certiorari, and the record is also here upon said writ (No. 311, October, 1919).

This Court has advanced the cause upon motion to advance pursuant to Rule 6 and has set the argument to follow the cases set for October 13, 1919.

The writ having been granted, counsel for appellants assume that the question of the right to appeal becomes unimportant, the record being here at all events, either by virtue of the writ or of the appeal; the questions arising upon the record are identical, whether they be considered as presented upon the appeal or pursuant to the writ.

If the writ had not been granted, it might be argued that appeal is the proper method of review of all dependent bills on the authority of *Eichel* v. *U. S. Fidelity &c. Co.*, 245 U. S., 102.

The brief for the petitioners in support of their assignments of error is presented herewith upon the writ of certiorari (No. 311, October Term, 1919), and it appears unnecessary to duplicate it in detail upon the appeal. Counsel for the appellants refer to said brief and ask that it be considered also as submitted upon the appeal. They deem it proper, therefore, merely to summarize upon the appeal the data presented at length in their brief upon the writ.

The questions presented by the record, while they PRIMARILY concern the *jurisdiction,* by reason of which question the cause has been advanced for

argument under Rule 6, *necessarily also,* it seems to counsel, concerns the *equity* presented by the plaintiffs; for, while the Circuit Court of Appeals recognized the existence of the jurisdiction asserted by the plaintiffs (Opinion, pp. 73-74), it denied that the case presented by the bill was within the jurisdiction invoked (p. 75), and dismissed for want of jurisdiction (p. 76) without prejudice.

The Trial Judge had dismissed without reservation (Decree, pp. 63, 64), and in his opinion (p. 66) passed over the question of jurisdiction and dismissed for want of equity (p. 68). In this respect the Circuit Court of Appeals modified the decree, and dismissed without prejudice for want of jurisdiction (p. 76).

At an early stage of the suit, Hough, *C. J.*, sitting in the District Court, had taken the view (p. 68) in granting an *ad interim* injunction that

> "* * * as an endeavor to restrain a defendant who was party or privy to a decree in bankruptcy there is jurisdiction to entertain suit."

The question of law upon which the matter was decided in both courts arose upon a demurrer to the bill (p. 62) incorporated in the answer thereto.

So that the question before both of the courts was whether the bill presented a cause of action within the jurisdiction of the Court.

This question was twofold, involving jurisdiction and *prima facie* right to relief.

The only ground upon which jurisdiction was invoked (the citizenship of the parties not appearing—Hough, *C. J.*, p. 68) was that sitting as a court of equity, the District Court had power to protect the plaintiffs against a suit in a South Carolina Court, in disregard of rights secured to the plaintiffs, and especially to the plaintiff Thomp-

son, by order and decree (Exhibits 8, 9, pp. 48, 49) previously issued out of the District Court sitting as a court in bankruptcy.

The Trial Judge declined to consider the jurisdiction of the bankruptcy court to issue the orders (Opinion, p. 66), and took the view that the plaintiffs' only recourse was to plead them in bar in South Carolina (p. 66); hence he denied both the jurisdiction invoked and the equity asserted. In short, his view was that, inasmuch as the orders could be pleaded in bar in South Carolina, there was no equity in resorting to the court which issued the orders to prevent the litigation of the question in South Carolina. He did not determine that the orders under which the plaintiffs, and especially Thompson, sought protection from the South Carolina suit, were not a defense in that suit, in which Thompson alone had been served with process or appeared (Bill, p. 12); his appearance therein being special and limited, to object to the jurisdiction, and to remove to the United States Court in South Carolina (p. 12), where the suit is pending undetermined (p. 12).

II.

A Concise Abstract or Statement of the Case.

This appears in detail in the brief upon the writ of certiorari, to which we refer. In substance the bill alleged that in bankruptcy proceedings against the Pell firm, of which Thompson was a special partner under the laws of New York, and the other plaintiffs were general partners, Thompson was made a party by intervening petition of creditors, who sought to have him also declared a general partner and a bankrupt; that Thompson was scheduled as a creditor of the bankrupts to the extent of $3,373,082.30, and also claimed to own securi-

ties which the firm had pledged for $2,150,000; that this controversy having arisen in the bankruptcy court, Thompson made a settlement with the receivers in bankruptcy (Exhibit 7, pp. 41-48), approved by the Court by order entered January 6, 1915 (Exhibit 8, p. 48), whereby Thompson, in connection with a pending offer of composition by the bankrupts, agreed among other things to pay the said loans aggregating $2,150,000 and to accept a transfer to him of his securities, and to await the determination of the Court as to his ownership of the securities and its adjudication whether he was a general partner, and to hold himself accountable as trustee of the securities if so adjudicated (p. 46).

The bill showed (among other things) that the offer of composition (pp. 28-41) provided that Thompson should waive and release his said claim of $3,373,082.30 (p. 29), that it should be adjudged that he was the owner of the pledged securities (p. 29), subject to the lien of the pledges (p. 30); that Thompson should furnish evidence of the discharge of the estates of the bankrupts from responsibility for the loans of $2,150,000 secured by the pledges (p. 30); that other securities enumerated should be delivered to Thompson (p. 30); that an adjustment and apportionment of liens should be made; that Thompson should release all of his claims, except those secured to him by the composition agreement (p. 31); and that the petitions (Exhibits 1, 2, pp. 15-24) to have him adjudicated a general partner and a bankrupt should be dismissed (p. 31). The bill showed also that the compromise and composition were confirmed by order entered January 25, 1915 (Exhibit 9, pp. 49-53), which among other things expressly provided for the dismissal of said intervening petitions against Thompson (p. 52), adjudged (p. 51) that it was for the best interests of the estate and its creditors that

the settlement with Thompson be made, and provided for a release by Thompson of all of his claims against the receivers, and the bankrupts and their estates, and upon his performance provided (p. 51)

> "and thereupon the said Robert M. Thompson, shall be relieved of any further liability to the said receivers or to the estate by reason of the order heretofore entered by this Court dated January 6, 1915, or *otherwise.*"

The bill alleged that Thompson was a special partner of the firm, under the law of New York (p. 3); it alleged in detail all of the above proceedings in bankruptcy (pp. 5-8); it alleged full performance by Thompson (pp. 7, 8); it further alleged that defendants had knowledge of the proceedings in bankruptcy (pp. 5-6), were scheduled as debtors and paid one of the scheduled claims against them (p. 5); that subsequently, in disputing their liability for the other of said debts scheduled against them with a trustee of assets appointed under the composition agreement, the defendants elected to defend on the ground of breach of contract of the said Pell firm (pp. 9-10), and that any claim the defendants now assert was provable in bankruptcy (p. 10). It alleged the institution and pendency of a suit in South Carolina by the defendants against the plaintiffs, with vexatious and malicious design (p. 11) to attack the effect of the proceedings in the bankruptcy court, growing out of the same state of facts, proven or which might have been proven therein, all exposing the plaintiffs to disturbance of the rights secured to them in the bankruptcy court; and that other numerous persons similarly situated threaten similar suits (pp. 12-13), and these the plaintiffs offer to admit to this suit as defendants (p. 13), though they are so numerous as to make it impracticable to make them

all defendants; it alleges that the plaintiffs have no adequate remedy at law (p. 13).

To the bill the defendants demurred, by demurrer incorporated in the answer (p. 62); and upon the demurrer all subsequent proceedings in the District Court and Circuit Court of Appeals took place.

III.

Specification of Errors Now Relied On.

These are set forth in the assignments of error already filed (p. 81), and are substantially as follows:

The Circuit Court of Appeals erroneously held that the District Court was without jurisdiction;

It erred in not holding that the District Court had jurisdiction ancillary to the proceedings in bankruptcy;

It erred in not directing that the District Court take jurisdiction and proceed with the cause and grant protection to the plaintiffs;

It erred in not giving adequate relief and protection to the appellants and especially to Thompson;

It erred in not directing retention of the cause and trial of the issues of fact;

It should have reversed the decree and remanded the cause with instructions to proceed with the trial.

IV.

ARGUMENT.

The determination of the Circuit Court of Appeals was erroneous; the District Court had jurisdiction, and the bill presented a cause of action in equity.

This point is fully argued, with citation of authorities, in the brief upon the writ of certiorari

presented herewith. A *summary of the argument* is as follows:

The Circuit Court of Appeals confined its reasoning to that part of the order confirming the composition which limited the effect of the discharge of the bankrupts to those creditors who assented, whereas it overlooked:

First, the effect of Thompson's settlement with the receivers with the approval of the Court;

Second, the dismissal of the intervening petitions against him (as a *retraxit,* not merely as a nonsuit); and the express release and discharge by the decree of all of Thompson's liability to the bankrupts, their receivers and their estate; he being, as a special partner under the statute law of New York, not liable for the debts of the partnership beyond the fund contributed by him to its capital; such release and discharge having been itself founded upon a withdrawal and waiver by him (Exhibit 6, p. 28) of his scheduled claim of $3,373,082.50 (Exhibit 5, p. 27), and his assumption of firm debts to pledgees of his own securities aggregating $2,150,000 (pp. 30, 38), subject to the apportionment and contribution provided by the offer of composition (p. 31) and the decree confirming it (Exhibit 9, p. 50);

Third, the fact that in legal effect, by accepting the status of debtors, and paying the receiver's demand against them of $261.52 (Bill, p. 5), the defendants are estopped to claim that they were nonassenting creditors, whose debt was not discharged by the discharge in bankruptcy;

Fourth, that the defendants, by electing to defend against the demand of the creditors' trustee under the composition and decree confirming it, on the theory of contract (Bill, pp. 9, 10), could not thereafter deny that they were contract creditors whose debt was discharged;

Fifth, that in legal effect, defendants having knowledge of the proceedings in bankruptcy (Bill, p. 6) and not having objected to the composition and its confirmation, did *assent* thereto, and their contract debt was thereby discharged.

In support of these contentions, the appellants show:

I. That the situation should appeal strongly to the conscience of a Chancellor in that Thompson, in good faith, settled his controversy with the receivers in bankruptcy, under the *aegis* of the bankruptcy court, withdrew a scheduled claim of $3,373,082.50, assumed an obligation of $2,150,000 to release his own property (subject to an indefinite subsequent apportionment), and thus changed his position for the worse, while the defendants acknowledged the status of debtors to the estate, had full knowledge of every step (Bill, p. 6), preserved complete silence, subsequently defended against demands made upon them as debtors of the trustee under the composition, on the theory of contract and a debt provable in bankruptcy (pp. 9-10); and now, when Thompson cannot be restored to his former position, the defendants, to annoy and harass him and the members of the Pell firm (Bill, p. 11), sue them in a distant forum for alleged tort, in disregard of the rights secured to Thompson and the members of the Pell firm by the proceedings in bankruptcy.

II. That ancillary jurisdiction to prevent such inequitable procedure in disregard of the orders in bankruptcy does exist and should be exercised.

III. That Thompson is admitted by the demurrer to have been a special partner (Bill, p. 3); that he was assailed in bankruptcy as a general partner; that he settled the dispute with the bankruptcy receivers, and his settlement was ratified by the

Court; that the Court's decree expressly relieved him of all liability to the receivers or the estate (p. 51).

IV. That the Court disregarded the effect of this settlement as entitling Thompson to the protection of the Court which ratified it and which released him from liability to the estate, the only liability a special partner could be under.

V. That the defendants did "assent" to the composition by their acknowledging their status as debtors to the estate, instead of creditors, by their complete knowledge of the proceedings in bankruptcy (Bill, p. 6), and by their silence, when it was their duty to speak, if they dissented.

VI. That the dismissal of the petitions in bankruptcy against Thompson was a *retraxit* and not a mere non-suit, and bound every creditor of the firm, including the defendants.

In *elaboration of these contentions* the brief upon the writ of certiorari, to which reference is hereby made, shows:

I. THAT REGARDING THOMPSON AS A SPECIAL PARTNER, IT IS A NECESSARY IMPLICATION OF HIS SETTLEMENT WITH THE RECEIVERS AND OF THE DECREE CONFIRMING THE COMPOSITION THAT HE WAS FULLY DISCHARGED AGAINST ALL THE WORLD FOR ALL LIABILITY TO OR FOR THE FIRM.

Thompson's liability as special partner was fixed by the limited partnership law of New York (*McKinney's Consolidated Laws of New York, Annotated,* Book 38, p. 55):

> "Sec. 36. Liability of partners. The general partners in such partnership shall be jointly and severally liable as general partners are by law. *The special partners shall*

not be liable for the debts of the partnership beyond the fund contributed by them respectively to the capital of the partnership."

The decree is a direct adjudication in that, as part of the compromise and in compliance with the terms of the composition, it dismissed (p. 52) the intervening petitions to have Thompson adjudicated a general partner.

The South Carolina suit is an attempt to relitigate this question.

U. S. v. CAL. & OREGON Co., 192 U. S., 355.

To permit the relitigation of the question which was settled would sanction a most dangerous principle.

UNION BANK v. GEARY, 5 Peters, 99, 114.

The decree cannot be thus collaterally attacked.

RE FIRST NAT. BANK, 152 Fed. Rep., 64, 70.

RE SWOFFORD BROS., 180 Fed. Rep., 549, 557.

HALL v. AMES, 182 Fed. Rep., 1008, 1014.

The bankruptcy court had jurisdiction under Section 27a and Subdivisions 7 and 15 of Section 2 of the Bankruptcy Law to determine the entire controversy.

The issue of Thompson's general partnership was squarely presented therein, and his status was the crux of the controversy.

(a) The power to adjudicate upon these facts existed.

IN RE SAMUELS, 215 Fed. Rep., 845, 849 (C. C. A., 2d Cir.).

ARMSTRONG v. FISHER, 224 Fed. Rep., 97, 99 (C. C. A., 8th Cir.).

FT. PITT ETC. CO. v. DISER, 239 Fed. Rep., 443, 447 (C. C. A., 6th Cir.).
FRANCIS v. MCNEIL, 228 U. S., 701.

(b) And the decree was conclusive and invulnerable from collateral attack.

GRATIOT ETC. BANK v. JOHNSON, U. S. Sup. Ct. Advance Opinions No. 11, April, 1919, 317, 319.
MICHAELS v. POST, 88 U. S., 398, 428.
SHAWHAN v. WHERRITT, 7 How., 628, 643.
LAMP CHIMNEY CO. v. ANSONIA BRASS ETC. CO., 91 U. S., 656, 661.
HERBERT v. CRAWFORD, 228 U. S., 204, 208.

The dismissal of the intervening petitions was a *retraxit*, and the decree confirming the composition was an adjudication that Thompson was not liable as a general partner.

23 CYC.—Title: Judgment, Retraxit, 1138 n. 43.
U. S. v. CAL. & OREGON CO., 192 U. S., 355.
UNITED STATES v. PARKER, 120 U. S., 89, 93, 95.

The contract with the receivers was a contract with the Court and the Court should enforce it.

FARMERS LOAN & T. CO. v. BURLINGTON ETC., 32 Fed. Rep., 805, 808.
RE HOLLINGSWORTH & WHITNEY CO., 242 Fed. Rep., 753, 756.
AMERICAN BONDING ETC. CO. v. BALTIMORE ETC. CO., 124 Fed. Rep., 866, 877.
FARMERS LOAN & T. CO. v. NEWMAN, 127 U. S., 649, 659.

The receiver's application (pp. 41-48) showed that creditors claimed Thompson to be a general partner and had filed petitions against him in involuntary bankruptcy; that Thompson claimed to be a special partner and a creditor to the extent of $3,373,082.30; that he claimed securities pledged by the bankrupt firm for firm obligations of $2,150,000, about to be foreclosed, threatening deficiencies; that it was for the best interest of creditors that the claim and petitions against Thompson be withdrawn, and that Thompson redeem the securities and indemnify the estate against loss, withdraw his claim and release the bankrupts, and that the receivers seek leave to agree accordingly.

The consent of a statutory majority of firm creditors required by the bankruptcy law was obtained, the Court approved the agreement, Thompson withdrew his claim, paid the pledges, and thus relieved the estate, and was released by the Court from all liability. No such provision is made as to the bankrupts because *quoad* them, it resulted from operation of law.

The integrity of this act should be maintained.

> In re Swofford, 180 Fed. Rep., 549, 556-557.
>
> Graham v. B. H. & E. R. R., 118 U. S., 161, 179.

The decree confirming the composition finds that the composition had been accepted by a majority in number and amount of creditors, after due notice as required by Section 58a(3) of the Bankruptcy Law, and determined that it was for the best interests of the estate and the creditors that the settlement with Thompson should be made and Thompson relieved of all further liability to the receivers or to the estate (p. 51).

The defendants had knowledge of the proceedings (Bill, p. 6), and notice was unnecessary to prevent the settlement from being effective against the defendants as firm creditors.

MATTER OF ABRAMS & RUBINS, 173 Fed. Rep., 430, 431.

KNAPP v. HARVED, 11 Am. B. R., 190, note; 25 Ohio Cir. Ct., 213, note.

COHEN v. PINCUS, 126 App. Div. (N. Y.), 792.

Creditors should act promptly or be bound.

RE FIRST NAT. BANK, 152 Fed. Rep., 64, 71.

RE MARION ETC. CO., 166 Fed. Rep., 618, 620.

COLLIER BANKRUPTCY, 11th Ed., p. 860.

The defendants were represented by the receiver and are bound by his settlement and the decree of January 25, 1915.

RE GOTTLIEB & CO., 245 Fed. Rep., 139, 145.

GRASSELLI CHEM. CO. v. AETNA EXPL. CO., 252 Fed. Rep., 456, 460.

The receivers represented in their application to the Court that the offer of composition "provides among other things for the *settlement of all questions and disputes with said Robert M. Thompson* and for the dismissal of said intervening petitions against said Robert M. Thompson" (p. 43).

The offer of composition was accepted by 160 creditors out of 285, having claims in excess of $2,300,000 out of $2,500,000, exclusive of Thompson's claim.

The release by the Court was complete and absolute.

IN RE SWOFFORD BROS. CO., 180 Fed. Rep., 549, 557.

The receiver represented all creditors of the firm in enforcing or settling its claims.

PAINTER V. PAINTER, 138 Cal., 231, 237.

The question settled with Thompson, by the agreement and decrees, should not be relitigated elsewhere.

MCCLELLAND V. ROSE, 247 Fed. Rep., 721, 726, and cases cited.

COTTON CO. V. SMITH, 144 Mo. App., 169, 173.

The proceedings in bankruptcy must be taken as valid and cannot be questioned here.

ABBOTT V. ANDERSON, 184 Ill. App., 598, 613-614.

HULL V. BURR, 206 Fed. Rep., 1, 3.

HALL V. AMES, 190 Fed. Rep., 138, 141.

HALL V. AMES, 182 Fed. Rep., 1008.

RIVERDALE COTTON MILLS V. ALABAMA ETC. CO., 198 U. S., 188, 197, 198.

MATTER OF SAGE, 224 Fed. Rep., 525, 532.

RE HECOX, 164 Fed. Rep., 823, 825.

II. THE SETTLEMENT, ORDER OF RATIFICATION, OFFER OF COMPROMISE AND ORDER OF CONFIRMATION DISCHARGED THOMPSON.

It effectually disposed of his liability to contribute to firm debts; and the decree of confirmation expressly released him (p. 51).

His release was as much a consideration moving to him in the settlement, as if he had purchased it as property from the receiver.

RE SWOFFORD BROS. DRY GOODS CO., 180 Fed. Rep., 549, 556, 557.

A failure, after knowledge, to object, is an "assent."

COWEN v. PADDOCK, 62 Hun, 622, mem.; 17 N. Y. Supp., 387 (in full).

Citing HUSTED v. MATHES, 77 N. Y., 390, to the effect that silence is evidence of *assent*.

PEOPLE v. DONG POK YIP, 164 Cal., 143, 147.

The defendants are estopped to change their position to the disadvantage of Thompson or the plaintiffs; they accepted the status of debtors and the composition was made on that assumption.

Innocent persons may be estopped.

GLOUCESTER BANK v. SALEM BANK, 17 Mass., 32 (cited with approval in LEATHER MFRS. BANK v. MORGAN, 117 U. S., 96).

MANUFACTURERS & TRADERS BANK v. HAZARD, 30 N. Y., 226.

CONTINENTAL NAT. BANK v. N. BANK OF COMMONWEALTH, 50 N. Y., 575.

GILBERT v. GROFF, 28 Hun, 50.

III. THE ANCILLARY JURISDICTION EXISTS AND SHOULD HAVE BEEN EXERCISED.

The general principle is sustained in *Eichel* v. *U. S. Fidelity & Guaranty Co.*, 245 U. S., 102.

It is the duty of Federal Courts to entertain dependent suits to prevent relitigation and protect rights and titles acquired under their decrees.

> ST. LOUIS & SAN FRANCISCO R. R. Co. v. MCELVAIN, 253 Fed. Rep., 123, 128, 135.

Such jurisdiction exists in the Court as a court of equity to protect rights arising in bankruptcy proceedings in the court.

> DEWEY v. WEST FAIRMOUNT GAS Co., 123 U. S., 329.
>
> BEACH v. MACON GROCERY Co., 116 Fed. Rep., 143.

The primary jurisdiction was adequate to support the ancillary jurisdiction.

The court in bankruptcy acquired full right to pass adjudication and administer the estate.

> LAZARUS v. PRENTICE, 234 U. S., 263, 266, 267.
>
> ACME HARVESTER Co. v. BEEKMAN LUMBER Co., 222 U. S., 300.
>
> MUELLER v. NUGENT, 184 U. S., 1.
>
> KNAUTH v. LATHAM, 219 Fed. Rep., 721, 722.

The bankruptcy court acquired jurisdiction over Thompson by the intervening petitions, and the subpoena served on him (Exhibits 1, 2, 3, pp. 15-24).

It seized, through its receivers, property claimed by him.

Its decree released him from all liability to the receivers or the estate.

The Court had power to determine whether he was a general partner.

> In re Samuels, 215 Fed. Rep., 845, 849.
> Armstrong v. Fisher, 224 Fed. Rep., 97, 99, 139.
> Ft. Pitt Coal & Coke Co. v. Diser, 239 Fed. Rep., 443, 447.

And to adjudicate his rights and liabilities as to firm creditors.

> In re Howard Co., 203 Fed. Rep., 445, 448.

He was unquestionably a party in the bankruptcy proceedings in virtue of the intervening petitions, the subpoena therein, his agreement and his stipulation to perform.

> In re Swofford etc. Co., 180 Fed. Rep., 549.

It is not permissible now for third persons to assert lack of jurisdiction over him.

> Re Hollingsworth etc. Co., 242 Fed. Rep., 753, 756.
> Armstrong v. Norris, 247 Fed. Rep., 253.

The bankruptcy court was vested with power

> To determine the controversy between the bankrupt's estate and firm creditors on the one hand and Thompson on the other, and to release him from further liability to the estate and the firm creditors;
>
> To cause the estate to be collected and reduced to money and compromise the conflicting claims by and against Thompson and to release him;

To confirm the composition and release him;
To bind the firm creditors in so doing.

The power is derived from the Bankruptcy Law.

Sec. 2 (7), (15); 27a; 47a (2), and General Order 28.

The bankruptcy court has the power to ascertain the ultimate relation and liability of the several parties.

In re Siegel-Hillman Dry Goods Co., 111 Fed. Rep., 980, 986.

And it is bound to protect its acquittance.

In re Swofford Bros., 180 Fed. Rep., 549, 556, 557.

The ancillary jurisdiction to protect against harassing litigation to attack a right acquired under its decree should not be questioned.

Thompson v. Emmett etc. District, 227 Fed. Rep., 560, 564.
Riverdale Mills v. Alabama etc. Mfg. Co., 198 U. S., 188, 195.
Sharon v. Tucker, 144 U. S., 533.
Ritchie v. Dorland, 6 Cal., 33, 37-38.
Orton v. Smith, 59 U. S., 263.

Section 720 of the Revised Statutes prohibiting the restraint of a suit in a State Court does not apply.

Gunter v. Atlantic Line, 200 U. S., 273, 292.
Julian v. Central Trust Co., 193 U. S., 93, 112.

RIVERDALE MILLS v. MFG. Co., 198 U. S., 188, 196-197.

DIETZSCH v. HUIDEKOPER, 103 U. S., 494, 497.

Section 11a of the Bankruptcy Law authorizing a stay *pendente lite* is not a limitation of the power of the Court as a court of equity; it is a grant of additional power.

A court of equity may protect a title which it has granted, and may effectuate its own decrees to avoid relitigation of a matter once settled.

RIVERDALE CO. v. ALABAMA ETC. Co., 198 U. S., 188, 195.

Process subsequent to judgment is as essential as process antecedent.

RIGGS v. JOHNSON Co., 6 Wall., 166, 187.

LAMB v. EWING, 54 Fed. Rep., 269.

The present suit is dependent upon the former decree.

McCABE v. GUARANTY TRUST Co., 243 Fed. Rep., 845.

WABASH R. Co. v. ADELBERT COLLEGE, 208 U. S., 38, 54.

JULIAN v. CENTRAL TRUST Co., 193 U. S., 93, 113, 114.

BRUN v. MANN, 151 Fed. Rep., 145, 150.

HATCHER v. H. & B. Co., 133 Fed. Rep., 267, 269, 270.

SHERMAN NAT. BANK v. SHUBERT Co., 247 Fed. Rep., 256, 258, 259.

Jurisdiction to enforce the decree continues.

WABASH R. CO. v. ADELBERT COLLEGE, 208 U. S., 38, 56, 57.
SIMON v. SO. R. CO., 236 U. S., 115, 124, 125.
RIVERDALE MILLS v. A. & G. MFG. CO., 198 U. S., 188, 195, 196.

It is not exhausted by the performance of the mandate, but may be invoked when rights conferred by it are assailed.

CENTRAL NAT. BANK v. STEVENS, 169 U. S., 432, 464, 465.
PHELPS v. M. R. F. L. ASSN., 112 Fed. Rep., 453, 458.

It is no defense that there is an adequate remedy at law.

GUNTER v. ATLANTIC COAST LINE R. CO., 200 U. S., 273, 278, 279, 293, 292, 293.
HAMILTON v. ALABAMA POWER CO., 195 Ala., 438.
FOLTZ v. ST. LOUIS & S. F. RY. CO., 60 Fed. Rep., 316, 322.

V.

The appeal as distinguished from the writ of certiorari.

The discussion of the right of appeal is probably supererogatory, the writ of certiorari having been granted; for, where appeal lies, the writ will not be granted.

YAZOO v. MULLINS, 39 Sup. Ct. Rep., 368.
NEW ORLEANS ETC. CO. v. SCARLET, 39 Sup. Ct. Rep., 369; 249 U. S., 528.

Hence, the writ having been granted, it might be safely assumed that it is the proper remedy and that an appeal will not lie.

But, since some attack might perhaps be made upon jurisdiction under the writ on the ground that an appeal lies, we safeguarded the application for the writ by procuring the allowance of the appeal. However, the question of law may be brought up for review whether upon the writ or the appeal; it is the same question; and in one or the other of the two ways, it is before the Court.

Certiorari is of course the proper remedy if the appeal does not lie.

JUDICIAL CODE, Sec. 240.

The reason for taking the appeal was as follows: Appeal lies unless the decision of the Circuit Court of Appeals is made final, subject only to review upon a writ of certiorari.

JUDICIAL CODE, Sec. 241.

This is a suit in equity for the protection of rights secured in the same court in bankruptcy. *c. f.,*

EICHEL v. U. S. FIDELITY & GUARANTY CO., 245 U. S., 102.

The jurisdiction invoked is ancillary, and therefore within the inherent power of the Court; it is not derived from statute, though the primary jurisdiction upon which it is based is statutory.

The law provides (38 U. S. Stats. at Large, Ch. 22, S. 4, p. 804, Acts 1915) that the decree of the Circuit Court of Appeals is final in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceeding.

If this is to be regarded as a case arising under the Bankruptcy Act, or a controversy arising in

such proceeding, then an appeal does not lie, but the writ of certiorari already granted is the only proper basis of review in this Court.

But there is ground for contending that the invocation of the equity power of the Court to protect those entitled to the benefit of its decrees and acts in bankruptcy, not differing in any respect from a similar application to protect rights obtained at law (*e. g., Eichel* v. *U. S. Fidelity & Guaranty Co.,* 245 U. S., 102), in equity or in admiralty, is *not* a case *arising* under the Bankruptcy Act or a controversy arising in a bankruptcy proceeding, but an appeal by dependent bill to the inherent power of the Court as a court of equity jurisdiction.

If this contention is sound, then the limitation of reviews in cases and controversies arising in bankruptcy is not applicable here, and an appeal lies unless there is some other limitation.

As this is not a case where the jurisdiction asserted is founded upon diversity of citizenship, the right of appeal is not limited by the law making the decisions of the Circuit Court of Appeals final in such cases.

JUDICIAL CODE, Sec. 128.

As this is not a case where the dismissal in the District Court was for lack of jurisdiction, but that Court passed over the question of jurisdiction and dismissed for want of equity (pp. 66, 68), it is not a case where the question of jurisdiction was the sole question in the District Court, and where, therefore, there can be no review except of the action of the District Court.

e. g.,

BOISE WATER COMPANY v. BOISE CITY, 230 U. S., 98.

BROWN v. ALTON, 222 U. S., at p. 331.

Therefore, if the writ had not been granted, and had not thus possibly rendered the question of the right of appeal immaterial, we should contend that this is a case in which the right of appeal survives because it does not encounter any of the statutory or judicial limitations upon that right.

JUDICIAL CODE, Sec. 241.
COLLIER BANKRUPTCY, 11th Ed., p. 576.
EICHEL v. U. S. FIDELITY & GUARANTY CO., 245 U. S., 102.

VI.

The decrees below should be reversed, and the questions of law having been determined in favor of the appellants, no issue of fact will be of legal importance, and judgment absolute should be directed for these appellants.

Respectfully submitted,

EMANUEL J. MYERS,
GORDON S. P. KLEEBERG,
Solicitors for Appellants.

LINDLEY M. GARRISON,
Counsel for Appellants.

Supreme Court of the United States

STEPHEN H. P. PELL *et al.*, Appellants, against W. GORDON MCCABE, JR., and WILLIAM F. GRAY, Appellees.	October Term, 1919. No. 335. Appeal from Decree.

IN ANSWER TO MOTION TO DISMISS APPEAL.

And now come Stephen H. P. Pell, Charles A. Kittle, Howland H. Pell and Robert M. Thompson, appellants in the above-entitled cause No. 335, on an appeal from the decree in the above-entitled cause, and by Lindley M. Garrison, counsel, answering the motion to dismiss the said appeal, respectfully state:

THE NATURE OF THE CONTROVERSY.

On September 13, 1918, in the District Court of the United States for the Southern District of New York, these appellants, as plaintiffs, filed their bill of complaint (Transcript of Record, printed pages 3-57)* invoking the exercise of an-

* All references are to printed pages of the transcript of record, and all italics, unless otherwise noted, are our own.

cillary jurisdiction against the defendants, wherein they allege in substance that the defendants, in disregard of a settlement of a controversy between Robert M. Thompson and the Receivers in Bankruptcy of the firm of S. H. P. Pell & Company, made and approved by the United States District Court for the Southern District of New York, in bankruptcy proceedings then and theretofore pending before it, and in disregard of the order or decree settling said controversy, and of a compromise agreement and decree confirming the same, had instituted and were carrying on a suit against the plaintiffs in a Court of South Carolina, whereby the defendants sought to relitigate a matter already determined in the Bankruptcy Court, and to assert a liability against the plaintiffs which had been fully determined, compromised and released in the bankruptcy proceedings.

The District Court, holding that the said bill was without equity, dismissed the suit upon the merits (Transcript, pp. 68, 63-64), and the Circuit Court of Appeals for the Second Circuit modified the judgment of dismissal so as to show that the dismissal was for want of jurisdiction, and without prejudice (pp. 76, 77) held in its mandate that the District Court was without jurisdiction, though in its opinion it discussed the merits of the bill (pp. 73-76).

A complete and detailed statement of the facts, as well as of the questions involved, is more particularly set forth in our petition to this Honorable Court for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit, which was granted on the 17th day of March, 1919 (No. 311, October Term, 1919), and

which has been advanced by order of this Court to be heard after the cases assigned for October 13, 1919.

They are also set forth in a concise abstract or statement of the case in the brief of these appellants, as petitioners, upon said writ of certiorari, now on file in this Court (said brief, pp. 5-12), and more concisely in the appellants' brief upon this appeal, also now on file in this Court (see said brief, pp. 4-7).

We respectfully refer to said statements and the data in the records upon which they are based.

The question of the jurisdiction of the District Court is not the only question involved in the action; there are additional questions, to wit, whether the plaintiffs' bill of complaint is meritorious and its prayer should be granted, or whether it should be dismissed for want of equity; and this additional question was discussed at length in the opinion of the Judge in the District Court and in the opinion of the Circuit Court of Appeals, both of which appear in the record (Transcript, pp. 66-68, 73-76).

We respectfully submit that it has not yet been authoritatively determined by this Court that an appeal cannot be taken to this Court in such a suit as this.

The Appeal as Distinguished from the Writ of Certiorari.

The discussion of the right of appeal is possibly supererogatory, the writ of certiorari having been granted; for, where appeal lies, the writ will not be granted.

Yazoo v. *Mullins,* 39 Sup. Ct. Rep., 368.
New Orleans etc. Co. v. *Scarlet,* 39 Sup. Ct. Rep., 369; 249 U. S., 528.

Hence, the writ having been granted, it might perhaps be safely assumed that it is the proper remedy and that an appeal will not lie.

But, since some attack might perhaps be made upon jurisdiction under the writ on the ground that an appeal lies, we safeguarded the application for the writ by procuring the allowance of the appeal. However the question of law may be brought up for review, whether upon the writ or the appeal, it is the same question; and in one or the other of the two ways, it is before the Court.

Certiorari is of course the proper remedy if the appeal does not lie.

Judicial Code, Sec. 240.

The reason for taking the appeal was as follows: Appeal lies unless the decision of the Circuit Court of Appeals is made final, subject only to review upon a writ of certiorari.

Judicial Code, Sec. 241.

This is a suit in *equity* for the protection of rights secured in the same court in bankruptcy.

c. f.,

Eichel v. *U. S. Fidelity & Guaranty Co.,* 245 U. S., 102.
Krippendorf v. *Hyde,* 110 U. S., 276.

The jurisdiction invoked is ancillary, and therefore within the inherent power of the Court; it is

not derived from statute, though the primary jurisdiction upon which it is based is statutory.

Minnesota Co. v. *St Paul Co.,* 2 Wallace, at pp. 633, 634.
Krippendorf v. *Hyde,* 110 U. S., 276.

The law provides (38 U. S. Stats. at Large, Ch. 22, S. 4, p. 804, Acts 1915) that the decree of the Circuit Court of Appeals is final in all proceedings and cases arising under the Bankruptcy Act and in all controversies arising in such proceeding.

If this is to be regarded as a case arising under the Bankruptcy Act, or a controversy arising in such proceeding, then an appeal does not lie, but the writ of certiorari already granted is the only proper basis of review in this Court.

But there is ground for contending that the invocation of the equity power of the Court to protect those entitled to the benefit of its decrees and acts in bankruptcy, not differing in any respect from a similar application to protect rights obtained at law (*e. g., Eichel* v. *U. S. Fidelity & Guaranty Co.,* 245 U. S., 102), in equity or in admiralty, is *not* a case *arising* under the Bankruptcy Act or a controversy arising in a bankruptcy proceeding, but an appeal by dependent bill to the inherent power of the Court as a court of equity jurisdiction.

If this contention is sound, then the limitation of reviews in cases and controversies arising in bankruptcy is not applicable here, and an appeal lies unless there is some other limitation.

As this is not a case where the jurisdiction asserted is founded upon diversity of citizenship, the right of appeal is not limited by the law making

the decisions of the Circuit Court of Appeals final in such cases.

Judicial Code, Sec. 128.

As this is not a case where the dismissal in the District Court was for lack of jurisdiction, but that Court passed over the question of jurisdiction and dismissed for want of equity (pp. 66, 68), it is not a case where the question of jurisdiction was the sole question in the District Court, and where, therefore, there can be no review except of the action of the District Court.

e. g.,

Boise Water Company v. *Boise City,* 230 U. S., 98.
Brown v. *Alton,* 222 U. S., at p. 331.

Therefore, if the writ had not been granted, and had not thus possibly rendered the question of the right of appeal immaterial, we should contend that this is a case in which the right of appeal survives because it does not encounter any of the statutory or judicial limitations upon that right.

Judicial Code, Sec. 241.
Collier Bankruptcy, 11th Ed., p. 576.
Eichel v. *U. S. Fidelity & Guaranty Co.,* 245 U. S., 102.

We appealed because the inherent power of the District Court was invoked, not as a court in bankruptcy, but as a court of equity, to prevent the disregard of its own decree sitting as a court in bankruptcy; and although the jurisdiction invoked is ancillary and the bill dependent, and

therefore not based, upon any statutory prescription of jurisdiction over the particular controversy, the suit is a suit in equity, not founded upon a diversity of citizenship, but founded upon inherent incidental power; incidental it is true to jurisdiction in bankruptcy, but the suit itself is not a proceeding or a cause arising under the Bankruptcy Act, nor a controversy arising in such proceedings nor in such a cause. In short, we submit that there is a distinction between a suit in equity dependent upon a decree in bankruptcy, and a proceeding or cause arising under the Bankruptcy Act or a controversy arising in such proceedings or in such a cause.

The distinction is emphasized and illustrated by the fact that to invoke the inherent but incidental jurisdiction by the suit in equity a fresh bill must be filed and a fresh original process issued against the proposed defendants, just as though it were a suit founded upon the constitutional equity jurisdiction of an inferior court created by Act of Congress, with the qualification that the venue is fixed by the previous pendency of the bankruptcy proceeding in the district instead of by the inhabitancy of one of the parties.

The distinction between jurisdiction and venue has been recognized by this Court.

In re Moore, 209 U. S., 490, 500, and subsequent cases in which it is cited.

In the case last cited it was said (p. 506):

> "So long as diverse citizenship exists the Circuit Courts of the United States have a general jurisdiction."

It is equally true that the Circuit Courts of the United States have inherent jurisdiction, as a judicial incident, to enforce their decrees, under whatsoever statutory authority their decree may have been entered. This inherent jurisdiction is not a part of the statutory jurisdiction, but attaches by virtue of inherent power as a court of superior general jurisdiction (see *Carey* v. *Houston & Texas Ry. Co.*, 161 U. S., at p. 128; *Gregory* v. *Van Ee*, 160 U. S., at p. 646), whenever the statutory jurisdiction has been invoked and the Court in the exercise of the statutory jurisdiction has proceeded to decree thereunder.

In passing the decree in this suit the District Court was not sitting in bankruptcy, but in equity. The bill (p. 3) was entitled "in equity"; it prayed the issuance of original process of subpoena (p. 13).

It differs in this respect from an application in equity to restrain a suit at law, upon which a subpoena need not issue (*e. g., Minnesota Co.* v. *St. Paul Co.*, 2 Wall., at p. 633), and resembles a suit to set aside a fraudulent decree, in which a subpoena must issue, but of which the Court which entered the decree has ancillary jurisdiction (*e. g., Pacific R. R. of Mo.* v. *Missouri Pacific Ry.*, 111 U. S., at p. 522).

We distinguish *Central Trust Co.* v. *Lueders*, 239 U. S., 11, cited by appellees (Motion, p. 4), on the ground that there the matter on appeal was presented to the Court sitting in bankruptcy, which as such court allowed disputed liens, in the course of the bankruptcy proceeding; and the fact that the constitutionality of the law upon which the claim of lien was predicated was involved did not

make the controversy any less a controversy arising in the bankruptcy proceeding.

It is more difficult to distinguish *Pope* v. *Louisville, New Albany etc. Ry.*, 173 U. S., 573 (cited by appellees, Motion, p. 4), and yet there is a distinction, in that the entire jurisdiction in that suit, whether the second bill were deemed an original bill or a dependent bill, was founded upon diversity of citizenship, and therefore the decision of the Circuit Court of Appeals was made final (*ibid*, p. 576).

It is there said (pp. 576, 577) that diversity of citizenship confers jurisdiction, irrespective of the cause of action; and that irrespective of citizenship, jurisdiction is conferred if the cause of action arises under the Constitution, laws or treaties of the United States.

The Court showed (p. 577) that undoubtedly the jurisdiction in the case was founded on diversity of citizenship (p. 577):

> "Not because that fact existed in respect of complainant and defendants, but because the suit was ancillary to those in which the receiver was appointed."

The sentence quoted at page 4 of appellees' brief commences thus:

> "When an action or suit is commenced by a receiver, appointed by a Circuit Court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the Circuit Court as a court of the United States is concerned;"

It is also there said (p. 578):

> "The only ground of Federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the Circuit Court of Appeals, the decision of that court would have been final under the statute. *And as this suit was in effect* merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the Circuit Court of Appeals therein."

The sole ground of any jurisdiction claimed in that case being diversity of citizenship, it mattered not whether it was founded upon diversity in the auxiliary bill or diversity in the original bill; it was in either case a jurisdiction founded upon diversity of citizenship, and therefore made final by statute so as to prevent appeal to this Court. But *it does not necessarily follow* (unless this Court upon this motion says that it does) *that* where the new suit is a suit in equity and the decree upon which it is predicated is a proceeding in bankruptcy, and the new suit is not a suit to carry out the directions of the decree, and is not in that sense an enforcement of it, but the new suit is a suit in equity to prevent by injunction interference with rights secured under the decree of the Court in bankruptcy, the right to appeal to this Court, secured by general provision of law, is limited by a law which denies such right of appeal only where the decision appealed from is a proceeding or cause arising under the Bankruptcy Act (which this is not) or a controversy arising in such proceedings and causes. This suit does not arise in a proceeding or cause under the Bankruptcy Act. It arises

subsequent to such proceeding or cause, and is related to it, but it does not arise in it. And we submit that a statute limiting a right of appeal should be strictly construed.

The decisions of this Court cited as authority in the case last cited do not establish the principle contended for by appellees. This Court may now extend that principle in this case, but until it does, the right of appeal should not be abandoned in favor of the review by writ of certiorari.

Two of the cases cited as authority in the case last cited (p. 577) were, as is there pointed out, cases of intervention; one was a bill of review.

None of them establish the general principle now contended for.

In the case last cited a writ of certiorari had been denied, and the appeal was then resorted to to secure a review (p. 576).

In the present case, the decree is already here on a writ of certiorari. And, as we have already shown in the brief upon the appeal (p. 2), the question seems unimportant in this case which way the decree shall be reviewed.

But we have deemed it our duty to the Court to point out that it was, and is, a matter of uncertainty still, whether appeal or writ of certiorari is the proper remedy for review in such a case, and therefore, as a matter of precaution, we necessarily resorted to both.

It would be beneficial to other litigants to have the question settled now upon this motion.

It may be that this suit is to be regarded as a continuation of the bankruptcy proceeding in analogy to the principle which regards a bill in equity to restrain a suit at law in the same court as a continuation of the suit at law (*Minnesota*

Co. v. *St. Paul Co.*, 2 Wall., at p. 633). But if the appeal is dismissed upon that ground, *it necessarily follows* that the jurisdiction invoked existed and that the Circuit Court of Appeals erred in dismissing for want of jurisdiction. The distinction between incidental controversies which may be reviewed in this Court, and others arising in the same litigation which cannot be, is illustrated by *Carey* v. *Houston & Texas Central Ry.*, 150 U. S., 170, 180, where an appeal was allowed, and *Carey* v. *Houston & Texas Ry.*, 161 U. S., 115, where it was dismissed.

WE SUBMIT THAT IF THE COURT SHOULD REACH THE CONCLUSION THAT APPEAL IS AN IMPROPER REMEDY, THE REVIEW CAN AND SHOULD BE MADE UPON THE WRIT OF CERTIORARI; OTHERWISE THE MOTION TO DISMISS THE APPEAL SHOULD BE DENIED, AND THE REVIEW SHOULD BE UPON THE APPEAL.

Respectfully submitted,

EMANUEL J. MYERS,
GORDON S. P. KLEEBERG,
Solicitors for Appellants.

LINDLEY M. GARRISON,
Counsel for Appellants.

FILED
SEP 24 1919
JAMES D. MAHER,
CLERK.

Supreme Court

OF THE UNITED STATES,

OCTOBER TERM, 1919.

No. 335.

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL AND ROBERT M. THOMPSON,
Appellants,

against

W. GORDON McCABE, JR., AND WILLIAM F. GRAY,
Appellees.

MOTION TO DISMISS APPEAL.

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New York City,
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Stillman Appellate Printing Co., New York.

Supreme Court,

OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 335.

STEPHEN H. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Appellants,

against

WILLIAM F. GRAY, W. GORDON MCCABE JR., and
Appellees.

MOTION TO DISMISS APPEAL.

Now come W. Gordon McCabe and William F. Gray, the defendants-appellees, in the above entitled cause by William St. John Tozer, their counsel, and respectfully move this Honorable Court to dismiss the appeal herein, on the ground that the decision of the Circuit Court of Appeals is final.

The said defendants-appellees, pursuant to the rule of this Court, make the following statement of the matter involved, and of the reasons for this application.

Statement of the Matter Involved.

The above entitled cause is a suit in equity brought by the plaintiffs-appellants, in the United States District Court for the Southern District of New York, for the purpose of perpetually enjoining these defendants-appellees, from further proceding in or continuing an action now pending in the United States District Court for the Eastern District of South Carolina, on the ground that an order confirming a composition in bankruptcy previously made by the United States District Court for the Southern District of New York in an involuntary proceeding in bankruptcy against three of the plaintiffs-appellants released and discharged the plaintiffs-appellants from all liability to defendants-appellees, and that said order of composition adjudicated and disposed of the issues involved in the action in South Carolina, to such an extent that defendants-appellants should be enjoined from continuing said action.

The answer to the appeal herein in lieu of demurrer raised the issue that the complaint does not make out or state such a case as entitles plaintiffs to any discovery or relief, and that it appears from the complaint that the United States District Court for the Southern District of New York has no jurisdicion of the parties or the subject matter of this suit either as an original action or as an ancillary suit, and that it appears on the face of the complaint that no cause of action exists in favor of these plaintiffs for the relief prayed for, or for any relief from said Court.

The issue thus raised was brought on for argument before the United States District Court for the Southern District of New York and the complaint was dismissed. The plaintiffs appealed from the decision of said District Court to the Circuit Court of Appeals for the Second Circuit; and that Honorable Court unanimously affirmed the judgment of the District Court as modified. An application was then made to this Court by plaintiffs for a Writ of Certiorari, which was granted. Upon motion of the respondents argument of the said cause was advanced and set down for the 13th of October, 1919.

In addition to the application for the Writ of Certiorari plaintiffs took an appeal to this Court. Transcripts of records have been filed in this Court both pursuant to the Writ of Certiorari and upon the appeal. This motion is to dismiss the appeal.

Reasons for the Application.

The decision of the Circuit Court of Appeals is one that is by statute made final.

The only ground upon which jurisdiction was invoked in the District Court is that the suit is ancillary to a proceeding in bankruptcy theretofore had in said Court (Rec., fol. 148).

Judgments of the Circuit Court of Appeals in bankruptcy proceedings are final.

Section 4 of the Act of Jan. 28, 1915, as amended by Sec. 3 of the Act of Sept. 6, 1916, Ch. 48, 39 Stat. L. 727, provides as follows;

> "Sec. 4. That judgments and decrees of the Circuit Courts of Appeals in all proceedings and causes arising under an act to establish

> a uniform system of bankruptcy throughout the United States approved July first, eighteen hundred and ninety-eight, and in all controversies arising in such proceedings and causes * * * shall be final, save only that it shall be competent for the Supreme Court to require by certiorari, upon the petition of any party thereto, that the proceding, case or controversy be certified to it for review and determination, with the same power and authority and with like effect as if taken to that Court by appeal or writ of error."

See also

Central Trust Co. vs. Lueders, 239 U. S., 11.

Proceedings ancillary to bankruptcy proceedings stand on the same basis of jurisdiction and decisions of the Circuit Court of Appeals in such ancillary proceedings are also final.

In *Pope vs. Louisville, etc., Ry.,* 173 U. S., 573, at p. 577, this Court said:

> "We have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the Circuit Court of Appeals, the judgments and decrees in the ancillary litigation are also final."

For the foregoing reasons and considerations the granting of the motion to dismiss is respectfully requested by the defendants-appellees.

Respectfully submitted,

WILLIAM ST. JOHN TOZER,
Counsel for Defendants-Appellees.

Notice of Motion to Dismiss.

Sirs:

Please take notice that the defendants-appellees will submit the foregoing motion to dismiss the appeal herein to the Supreme Court of the United States at a stated term thereof on Monday, October 13, 1919, at the Capitol in the City of Washington, D. C., at the opening of the Court on that day or as soon thereof as counsel can be heard.

Yours respectfully,

WILLIAM ST. JOHN TOZER,
Attorney for Defendants-Appellees,
No. 42 Broadway,
New York City,
New York.

To MYERS & GOLDSMITH, Esqs.,
Attorneys for the Plaintiffs-Appellants.

Office Supreme Court, U. S.
FILED
OCT 13 1919
JAMES D. MAHER,
CLERK.

Supreme Court of the United States,

OCTOBER TERM—1919.

(No. 335)

STEPHEN H. P. PELL, CHARLES A. KITTLE, HOWLAND H. PELL and ROBERT M. THOMPSON,
Appellants,

versus

W. GORDON MCCABE, JR., and WILLIAM F. GRAY,
Defendants.

Memorandum for Defendants

WILLIAM ST. JOHN TOZER,
Attorney for Defendants.

HENRY BUIST,
WILLIAM ST. JOHN TOZER,
GEORGE L. BUIST,
of Counsel.

Stillman Appellate Printing Company, 200 William Street, New York City.

Supreme Court of the United States.

OCTOBER TERM, 1919.

No. 335.

STEPHEN H. P. PELL, Charles A. Kittle, Howland H. Pell and Robert M. Thompson,
Appellants,

vs.

W. GORDON MCCABE, JR., and William F. Gray,
Defendants.

MEMORANDUM FOR DEFENDANTS.

Appellants have served and filed a brief on this appeal. But, as a motion to dismiss the appeal has been made which we believe must prevail, and as the questions on this appeal cannot be different from those under review by certiorari, argument of which (No. 311) has been set for October 13, 1919, upon which we have filed a full brief, we believe it would be imposing an unnecessary burden upon the Court for us to file a brief on this appeal, which would necessarily be simply a duplicate of our brief in the certiorari proceedings. We, therefore, request that, in the event that the motion to dismiss

the appeal shall not be granted, that our brief submitted on the certiorari proceedings be considered as submitted on this appeal as well.

Respectfully submitted,

WILLIAM ST. JOHN TOZER,
Attorney for Defendants.

HENRY BUIST,
WILLIAM ST. JOHN TOZER,
GEORGE L. BUIST,
Of Counsel.